

# Indiana Law Review



Volume 28 No. 3 1995

## CENTENNIAL YEAR 1894/1895—1994/1995

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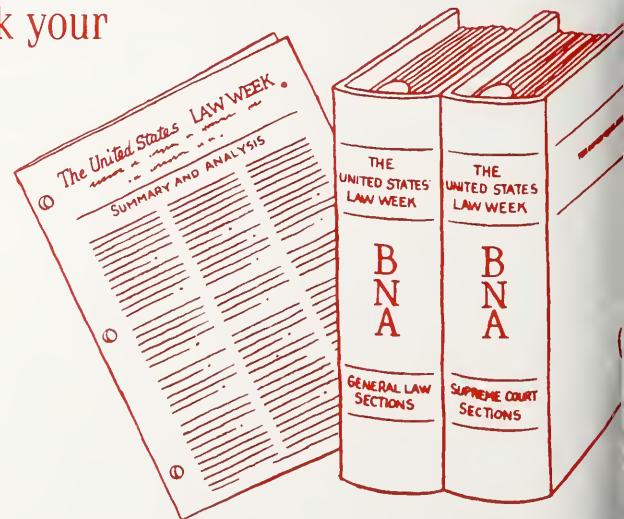
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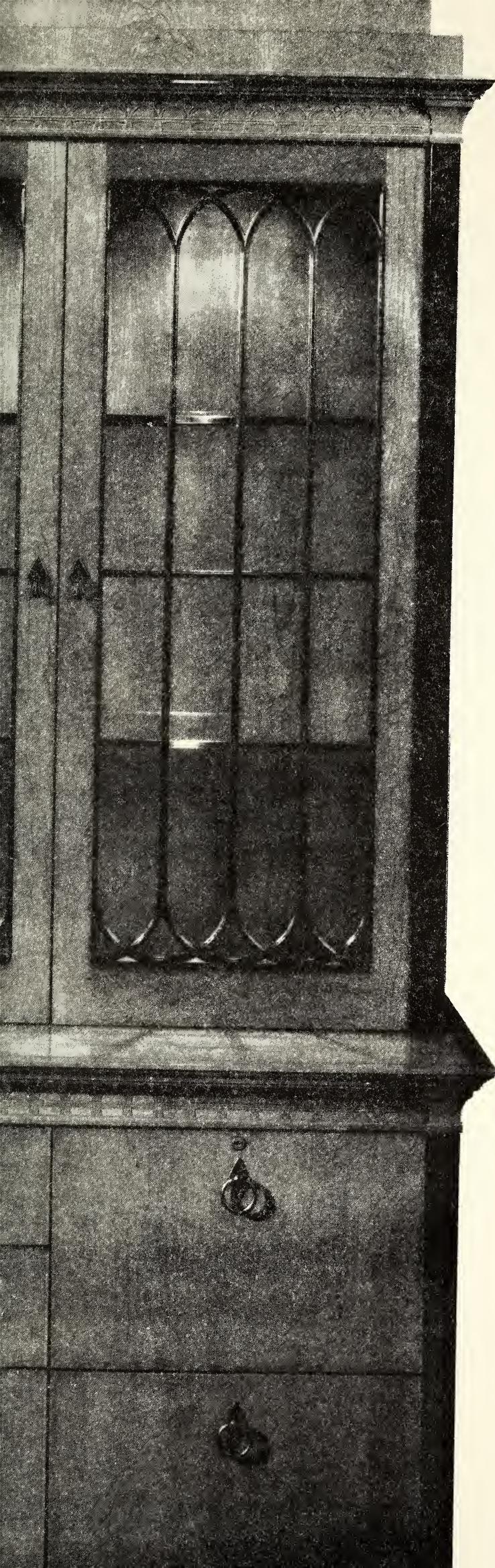
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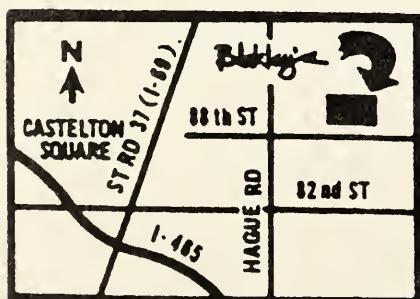
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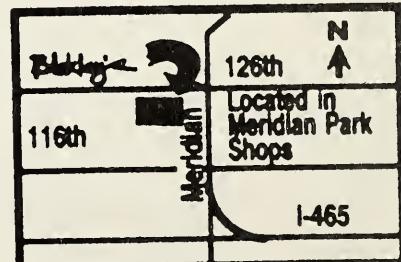
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## SYMPOSIUM

### INTRODUCTION: NATIONALISM, IDENTITY, AND LAW

LAWRENCE M. FRIEDMAN\*

The four papers that make up this Symposium have an important common theme. They are all concerned with the idea of ethnic identity. Nobody who reads newspapers or watches television can fail to be aware of how much this subject is in the news. Ethnic identity has had and continues to have a powerful impact on modern politics, both national and international. The most dramatic effects are on war and peace. Ethnic identity bears a share of the blame for the murder and chaos in Yugoslavia, and it sets off bombshells and gunfire at many points around the world. Ethnic identity gone wild has torn Rwanda apart; and has worked incredible mischief in the ashes of the Soviet empire. In fact, as Daniel Moynihan put it, "nation states" no longer go to war with each other, "but ethnic groups fight all the time."<sup>1</sup> Ethnicity has its impact short of war as well: It is an issue that disturbs domestic peace in country after country—not least of all, the United States of America.

Ethnic identity, indeed, has elbowed its way onto the center stage of politics in many countries, including this one. Whatever is central to politics, and burdens the mind of society, becomes a central issue in the legal system as a matter of course. Ethnic identity arises as an issue in every field of law. Immigration is an obvious example; but there are so many other effects, from cross-racial adoption, to land claims of native Americans. This last one, of course, is an issue this Symposium addresses in some detail.

Ethnic identity is a form of nationalism. But the "nation" is, to a certain extent, a modern invention. I use the term "invention" advisedly. Nobody who writes on the subject these days can or does ignore Benedict Anderson's notion of the "imagined community";<sup>2</sup> or, for that matter, Hobsbawm's argument about the "invention of tradition."<sup>3</sup> The root idea here is that ethnic identity is not natural and inborn, nor the product of ancient tradition; instead, it is socially constructed. It is, in fact, one of the bastard children of modernization.

This insight, to be sure, can be carried too far. How well do Anderson's observations apply to countries of the Third World, each of which has its own special history of action and reaction?<sup>4</sup> Despite Anderson, too, many peoples of the world, and for a very long

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\* Marion Rice Kirkwood Professor, Stanford University School of Law.

1. DANIEL PATRICK MOYNIHAN, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS* 5 (1993).
2. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983).
3. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1 (Eric Hobsbawm & Terence Ranger eds., 1983).
4. See PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993).

time, have had a sense of themselves as a group, an entity separated from their neighbors. They are aware that they speak a common language, which other people do not speak; that they have special habits, customs, ways of life; and that the people in the next village or camp or over the next mountain are different—radically different, or so it may seem. Curiously enough, this observation may be most true of smaller communities, of “tribes” and less true of the peoples of Europe, for example. Peasants in a village some distance from Paris, in the sixteenth century, did not spend much time thinking of themselves as “French.” Nationalism grew rapidly in the eighteenth and nineteenth centuries, especially the latter; and it developed in its own special way in each country,<sup>5</sup> to some extent in each region.<sup>6</sup> It has now spread all over the world.

All this talk about “social construction” or the “invention of tradition” does not mean, of course, that national feelings, ethnic feelings, are unreal; they are, on the contrary, incredibly powerful. “Nationalism” satisfies some deep-seated need; it originates, perhaps, in the “primordial attachments of an individual to a group.” This makes it kin to emotions that “existed long before the group to which such passionate loyalty was attached became the modern nation-state.”<sup>7</sup> Whatever the source, the strength of these emotions—their political force in the modern world—has to be reckoned with.

In the nineteenth century, it was often the elites—as likely poets as politicians—who preached and taught the sermon of nationalism. These elites were struggling to make a conscious unity out of scattered peasants and villagers; their peoples were often ethnic minorities trapped in the cages of empires. In Europe, this was the century of Czech nationalism, Flemish nationalism, Hungarian nationalism, Bulgarian nationalism, and so on. The leaders were trying to create a sense of solidarity, of identity. They were also, very often, quite literally trying to construct a *language*, out of a welter of dialects and speech-ways. Nationalist “mythology” supposes languages to be “the primordial foundations of national culture.”<sup>8</sup> The truth is quite different—national languages are “almost always semi-artificial constructs.”<sup>9</sup> Almost every other aspect of ethnic identity is this sort of construct. Another “construct” is history itself. The movements tried to create a “truly living past,” full of glorious or heroic or tragic “tableaux”; the point was to strengthen the notion of a single people, with a single historical experience. Thus we have William Tell and the apple, “Alexander Nevsky slaughtering the Teutonic Knights,” Joan of Arc, the Jews by the “waters of Babylon,” and the “last Welsh bard lamenting on a crag above King Edward’s advancing army.”<sup>10</sup>

Today, the elites are less evident in the spread of nationalism, having been replaced by the media: books, newspapers, radio programs, movies, and most significantly, perhaps, television. The media at one and the same time homogenize and divide. They

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5. LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY (1992).

6. For a case study, *see, e.g.*, PETER SAHLINS, BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES (1989).

7. WILLIAM PFAFF, THE WRATH OF NATIONS: CIVILIZATION AND THE FURIES OF NATIONALISM 196 (1993).

8. ERIC J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 54 (2nd ed. 1992).

9. *Id.*

10. ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS 180 (1986).

flatten out local dialects and promote a single standard language, at least in their broadcast zones. They also disseminate a kind of world culture. People all over the world—particularly young people—tend to dress alike, listen to the same music, dream the same dreams. They certainly watch the same programs. They want the same consumer products. As Eugeen Roosens has pointed out, practically everybody hankers after the money and goods of the modern world: “commodities that put one in command . . . [and] objects that offer hedonic advantages.”<sup>11</sup> There is, in fact, a “kind of transcultural consensus . . . about the value of a number of products of the modern world.”<sup>12</sup>

At the same time, millions of people, especially members of minority groups, decide that their dreams cannot be realized without a space, a homeland, independence or autonomy; only in this way can they get control of education and the courts, force recognition of their speech-ways, and have television stations of their own; only in this way can they escape from the poverty, misery, and oppression that is imposed on them; only in this way can they acquire the goods and trappings of modernity. The road to the dream requires claims of rights that rest on group membership. Group membership, in turn, is defined in terms of common descent, common culture and tradition. The paradox, then, is that the future seems attainable only through deliberately exalting a (partly fictitious) ethnic past.

In any event, national movements grow up out of these aspirations; sometimes, they cause bloody wars; sometimes, too, they sow the evil seeds of genocide. What June Starr calls the “myths” of nationalism<sup>13</sup> can be potent—and deadly. But these aspirations have also led, in *some* countries—a fortunate few—to genuine attempts at establishing a working pluralism. One example that comes to mind is Switzerland. Another candidate is Singapore. In Belgium and Canada, accommodation is shaky; but so far the center holds. Even in these countries, however, “pluralism” has its limits. Belgium may be willing to grant equality to Flemish and Walloons, but not to Moroccan guest-workers; French-Canadians, only too eager to see themselves as an oppressed minority, are far less forthcoming when confronted by native peoples.<sup>14</sup>

The United States is a rather complicated case. It is one of the group of so-called “immigrant countries”—countries settled largely by people who wandered in or were brought in from someplace else. Australia, Argentina, and, less obviously, Singapore, fall into this category. These countries have a special problem in building a national identity. Blood and descent are powerful ideas (or myths) in the shaping of ethnic identity. Many nations think of themselves, or talk about themselves, as if they were some sort of super-clan, a grotesquely extended family. For them, the language of ethnicity “is the language of kinship.”<sup>15</sup> But immigrant countries have to find some other myth; in no way can they all claim to be children of the sun god, or scions of some noble tribe or clan.

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11. EUGEEN E. ROOSSENS, *CREATING ETHNICITY: THE PROCESS OF ETHNOGENESIS* 157 (1989).

12. *Id.*

13. June O. Starr, *Passionate Attachments: Reflections on Four Myths of Nationalism*, 28 IND. L. REV. 601 (1995).

14. ROOSENS, *supra* note 11, provides material on both of these countries.

15. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 57 (1985). Horowitz also points out that members of such groups often “call each other brothers and call distantly related groups cousins.” *Id.*

How "Americanism" came to be defined is a complicated story. During much of American history, the people who ran the country could make some simple assumptions about what American identity consisted of. Basically, American values were the values of English-speaking Protestants, seasoned and spiced with some ideas from the American revolution, and influenced by the particular conditions of American life, and an overarching belief in something called "equality."

Of course, the meaning of "equality" was not self-evident; and it has changed over the years.<sup>16</sup> Not everybody fit the dominant pattern; not everybody was allowed or *expected* to fit. There were, for example, black slaves, who definitely did not count as equal. Women's rights were less than men's, and were not on the same plane of authority. There were also native peoples, objects of exploitation and war. There were scattered immigrants of other sorts. These immigrants were, on the whole, tolerated (though we should not ignore the burning of convents and other nativist games). The new arrivals in fact had one clear, overarching task: They were supposed to assimilate into the American mainstream.

What upset these cozy understandings was mass immigration at the end of the century from southern and eastern Europe: the millions of Poles, Italians, Greeks, Jews, and Slavs who poured in at the gates and harbors of America. This was one factor among many that produced a kind of national panic among old-line Americans. What was happening to the country? What would happen to real, honest-to-goodness American values? Or American culture? The crisis came to a head in the early twentieth century; it led to the notorious "Red Scare" after the first World War;<sup>17</sup> and it reached a kind of climax in the immigration act of 1924, with its national quota system.<sup>18</sup> The statute was blatantly racist in the older sense of that word—biased against such "races" as Italians, Jews, and Poles.

A lot of water has gone under the bridge since 1924. The ideal of assimilation is certainly not dead; but it is under severe attack. The ethnic minorities have become a great deal more assertive. For a variety of obvious reasons, this assertiveness takes a particularly complicated and specialized form if the minority is Navajo or Cherokee; but many other "nations" now claim, if not a share of land, then wealth, or prestige, or, more simply, legitimacy and the right to exist in peace.

Curiously, in countries like the United States, "nationalism" in the classic sense is threatened if not displaced outright by the demands of the constituent "nations." The idea of "nationalism" was always the idea of a super-identity that trumped all other identities. But in a pluralist society, there is no such super-identity; rather, the sub-groups become "nations"—they claim *their* identity as the one that trumps all others, at least within their group. Of course, group members do not necessarily buy this line. Nobody forces a woman of seventy, for example, to become a gray panther; nobody forces a Chinese-American to agitate for the cause; nobody forces an African-American or Latino, or people in general, to become militant about anything. But enough people join enough of the parades to make a real difference in politics and society.

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16. See JACK RICHON POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (2nd ed. 1993).

17. See WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963).

18. 43 Stat. 153 (1924).

What happened to American nationalism has also happened, to a degree, to *internationalism*. The old Marxist left trumpeted the unity of the working class, and expected some kind of international solidarity to emerge among the world's downtrodden. But the new left is not much of an economic left; rather it is a cultural left, splintered into dozens of groups, each with its own special claim on the polity. These groups can and do form coalitions for this or that purpose; but these coalitions are inherently unstable. College campuses have plenty of "rainbow coalitions"—councils and working relationships among various minority groups. These groups are much rarer in the outside world.

Yet, in some ways, a new sort of internationalism has emerged; an internationalism of mass culture. That mass culture is more than movies and blue jeans. It also includes a cluster of character traits—and elements of *legal* culture as well. There is, I believe, a distinctively *modern* legal culture;<sup>19</sup> and it includes rights-consciousness. Thus even the despised and downtrodden guest-workers in European countries have a feeling of entitlement, based not on "national citizenship" but on a "more universal model of membership, anchored in deterritorialized notions of persons' rights."<sup>20</sup> Hence even if a Turkish guest-worker, for example, rejects German identity and citizenship, he may feel conscious of himself as a bearer of rights and he may seek to advance his cause by joining with other Turks—by affirming his Turkishness, his allegiance to Islam, his cultural heritage.

The issue of ethnic identity is thus of far more than academic interest. But it is a delicate subject for the law. It is one thing to sit around earnestly talking about how reality is socially constructed. It is another thing to ask a real court, with real judges, to make real decisions about rights and duties, which have real-world consequences (I will return to this point). This difference of course is what led to the dilemma of the Mashpee case, which Professor Carrillo and Professor Perry discuss.<sup>21</sup> I think Professor Carrillo's point is especially well taken: Under modern conditions, for many "tribes," there is and can be no "distinct, impermeable boundary between the tribe and the town, as least as far as culture [is] concerned."<sup>22</sup> That is precisely the dilemma of *all* the identity components in a pluralist society: races, ethnic groups, religious groups, gender groups, the handicapped, students, prisoners, "sexual minorities," and so many others. They all live together, culturally speaking; and none of them has "distinct, impermeable boundaries."<sup>23</sup>

This is so, in the first place, quite concretely and literally. A good deal of racial segregation exists in America; and *some* of the Native Americans live in compact, geographic clusters or reservations. But many blacks, Latinos, and Native Americans must live out their lives in the midst of other Americans. Generally speaking, all Americans are mixed together in one giant pot. The *cultural* boundaries, too, are very

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19. Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117 (1994).

20. YASEMIN N. SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 3 (1994).

21. The problem of that case is hardly unique; see ROOSENS, *supra* note 11, for a discussion of the Huron of Canada, another "Indian" group that had lost its language, and most of its distinctive culture, and yet retained a stubborn sense of ethnic identity.

22. Jo Carrillo, *Identity as Idiom: Mashpee Revisited*, 28 IND. L. REV. 511, 534 (1995).

23. *Id.*

porous. Groups like to think of themselves as culturally distinct. But the irony is that they are less and less so as the years go on. They have their markers of ethnicity; and yet they all share more or less in the giant world culture—a culture television spreads throughout the world like a viral pandemic.

It is this culture, indeed, that makes the “nations” so self-conscious. This brings me back to the paradox inherent in Anderson’s and Hobsbawm’s message: The search for tradition, the search for a distinctive ethnic identity, is itself a product of modernity.<sup>24</sup> How could it be otherwise? “Customary law,” as Professor Obiora reminds us,<sup>25</sup> is in one sense not customary at all—it has certain roots in the past; but it is necessarily modern, and shaped by modern conditions and modern problems.<sup>26</sup> It was, in the beginning, often a highly artificial construct: “systematic, neat, and fixed rules from ideal reconstructions,” recorded from various sources,<sup>27</sup> which obviously did not reflect the subtle, shifting, complex reality of the culture that gave birth to these practices.

The same tale could be told about “Western” law. I doubt that reconstructions of, say, Tswana law are any more artificial, any more alien to the working legal order, than the *Restatement of Torts*. But this is not the point. The nub of the matter is not the artificial *form* of “customary law”; but the artificial *content*. Western observers can look at customary law-ways—either romantically or in disdain—as ancient, unchanging, and deeply rooted in traditional mores. But any such legal practices, if they existed, could not survive in the twentieth century. This point is independent of the efforts of colonial power to impose law on third world countries, although of course that imposition has also been significant. The real problem is that “customary law” rested on ways of life that no longer exist. A cash economy, jobs for wages, and the market system have been far more destructive to “customary law” than any codes imposed by foreign devils. Traditional patterns are not cut out for the modern world.

This description almost sounds like an insult; but it is not meant as such. Exactly the same point can be made about “Western” law. The medieval common law was just as unsuited to modern capitalism as old norms of African peoples would be. By the same token, “Roman law” (or what is left of it) is not the real basis of French or German law, whatever antiquarians might think. The raw material has been twisted totally out of shape—and necessarily. Every system has to adapt; this need is no less true of “customary” systems. And adapt they do. Mari Matsuda has given a dramatic account of the way market factors transformed native culture—and native *legal* culture—in Hawaii in the nineteenth century.<sup>28</sup> Even before the imposition of Western *law*, legal consciousness had altered, and traditional patterns had weakened, under the ruthless hammer blows of social change.

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24. See *supra* notes 2-3 and accompanying text.

25. L. Amede Obiora, *New Skin, Old Wine: (En)Gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575 (1995).

26. There is a rich and growing literature on this point. See, e.g., MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (1985).

27. Obiora, *supra* note 25, at 587.

28. Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16 (1988).

Ethnic movements often insist that they are movements of restoration as well as liberation. They tend to look back to some golden age or other. They want to preserve and restore ancient cultures. Of course this task cannot be done. The past is completely dead; the members of the group are alive. They are alive, moreover, in the twentieth century, not in the nineteenth or the thirteenth; and they cannot escape the twentieth century world. One scholar has recently described contemporary "Indian tribes" as "an amalgam of traditional identifications and organization, federal pressures, and Indian improvisation."<sup>29</sup> Probably all "indigenous" peoples—probably *all* peoples, of all sorts—are "an amalgam" of tradition and modernity. Anything else would be a social impossibility. There are no "living fossils" among societies exposed to the modern world.

But what then does it mean to "preserve" a culture? What it usually means, in practice, is preserving or restoring a kind of autonomy; a sphere in which whatever the group does practice—its actual culture—is meaningful and respected. And it means that the culture is a way to "get ahead." In practice, autonomy means language, control of television stations, schools, and the voting booth. Linguistically speaking, English is in no way superior to Navajo or Inuit; there are no such things as "better" or "worse" languages (or more "primitive" and less "primitive" languages). Native religions can make as strong a claim to eternal truth, in their own terms, as any of the major world religions. A wide range of norms can also make the claim for equal dignity. Achieving *political* autonomy, however, is never a simple matter—or plural equality, which is the equivalent, culturally speaking, within a single national unit. On the one hand, there should be enough equality for everybody. But the claims are for more than status or dignity. The groups want more than just recognition. They want money, rights, and land. These claims, quite naturally, lead to resistance.

And when we put the matter this way—in terms of claims or demands for material goods—the demands seem crass and even hypocritical, a grab for naked power. Small wonder, then, that courts and other agencies (not to mention the general public) find it hard to sympathize with the wilder claims of submerged minorities. The problem, often enough, is bewilderment, not bias.

Courts find it hard, too, at times, even to recognize that what faces them *is* a submerged minority. No language? No purity of blood? No "authenticity"? Law is concrete, down-to-earth; the cases turn on specific claims to specific land, money, goods. Law is based on standards that are raw, visible, and objective; but the ethnic identity itself can be intensely subjective—*felt*, not seen; experienced inwardly, rather than exposed to view in tangible sense-data.

Sadly, nobody really understands his or her own culture. An outsider just might; but only the rare outsider ever achieves that flash of insight. The rest of us stumble along, groping in the dark. Ethnic nationalism often generates this tragic blindness—on everybody's part, inside the group or out. Still, scholars have a duty to try to break through, to make sense somehow. The four papers in this symposium make a contribution to that end. The last word on the subject, of course, is very far from spoken.

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29. Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1145 (1994).



# IDENTITY AS IDIOM: *MASHPEE* RECONSIDERED

JO CARRILLO\*

## INTRODUCTION

In the late 1970s, at the height of the American Indian rights movement, the Mashpee Wampanoag tribe filed a lawsuit in federal court asking for return of ancestral land.<sup>1</sup> Before the Mashpee land claim could be adjudicated, however, the tribe had to prove that it was (just as its ancestral predecessor had been) the sort of American Indian tribe with which the United States could establish and maintain a government-to-government relationship. The *Mashpee* litigation was remarkable. For one thing, it raised profound and lingering questions about identity, assimilation, and American Indian nationhood. For another, it illustrated, in ways that become starker and starker as time goes on, the injustice that the Mashpee Wampanoag Tribe has endured.

The Mashpee had survived disease, forced conversion, forced education; they had maneuvered through passages of history in which well-meaning and not-so-well-meaning non-Indians “freed” them from their Indian status, thereby exposing Mashpee land to market forces; they had survived the loss of their language. In spite of it all, the Mashpee maintained their cultural identity, only later to be pronounced “assimilated,” and therefore ineligible for federal protection as an American Indian tribe. What the Mashpee tried to characterize as syncretic adaptations to the harsh realities of colonialism, others called the inevitable and wholehearted embrace by the Indians of “superior, rational, ordered” white ways. Hence when the Mashpee prayed with their own Indian Baptist ministers, non-Indian commentators claimed they had embraced an African-American version of Protestantism; when they spoke English, they were said to have benefitted from white education; when they used legal forms like deeds, it was cited as evidence of their preference for American law.

Despite all of the politicized and colonialist commentary about the degree of assimilation the Mashpee had or had not attained, by the late 1970s it was still apparent, even to those who hoped to defeat the Mashpee claim, that the Mashpee Wampanoag plaintiffs did in fact represent an American Indian tribe. Indeed, the defendants who forced the issue of tribal status in the first place, took the position that the Mashpee were “more” African American than American Indian, a stance they maintained even after two of their representatives traveled to Montana to confer with Montanans Opposing Discrimination (MOD),<sup>2</sup> a group today known as All Citizens Equal (ACE), and based in

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1. *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass 1977); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F. 2d 575 (1st Cir. 1979), *cert denied*, 444 U.S. 866 (1979).

2. RONA SUE MAZER, *TOWN AND TRIBE IN CONFLICT: A STUDY OF LOCAL-LEVEL POLITICS IN MASHPEE, MASSACHUSETTS* 233-48 (1980) (unpublished Ph.D. dissertation, Columbia University) (noting that Selectmen George Benway and Kevin O'Connell's 1976 trip cost the Town of Mashpee \$832; documenting that Selectman Robert Maxim, a Mashpee Wampanoag tribal member, was not invited on the trip and hence did not

Polson, Montana, on the Flathead Indian Reservation.<sup>3</sup> In the late 1970s, MOD was affiliated with the Interstate Congress of Equal Rights and Responsibilities (ICERR), a group whose anti-Indian rhetoric echoed the complaints of non-Indian settlers who chose to live in Indian Country, but then bitterly resented being subject to Indian governmental jurisdiction.<sup>4</sup> This self-styled congress, at least at the time of *Mashpee*, was an

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travel to Montana with Benway and O'Connell; detailing the involvement of Benway and O'Connell in the local anti-Indian organization called the Mashpee Action Committee).

3. The Flathead Reservation, like many western reservations, is populated predominantly by non-Indians. According to Ken Toole, of the Montana Human Rights Network, a group that monitors white supremacist groups in the Northwest, although ACE is not organizationally linked to militia organizations in Montana, it has many "interpersonal connections." For instance, said Toole, there was an anti-Indian rally in Polson, Montana within weeks of the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, an act which killed 167 people and for which two suspected right-wing extremists have been charged as of this time. Toole noted that the Montana Human Rights Network has evidence that white supremacists, in an effort to exploit jurisdictionally charged situations on the Reservation, disseminate anti-semitic and other white supremacist tracts to crowds at anti-Indian rallies. Toole further noted that while non-Indians living on reservations may have legitimate concerns about property rights and values, right-wing hate groups, who flock to areas where there is racial polarization, distort those concerns beyond recognition. He also noted the existence of non-Indian groups like HONOR, which support Native American identity through the continued recognition of Indian treaty rights. Telephone interview with Ken Toole, President, Montana Human Rights Network (May 8, 1995).

The eastern land claims cases, of which *Mashpee* was one, are part of this overall social tension in Indian Country. For a thorough discussion of the legal issues raised in the eastern land claims cases, *see Symposium on Indian Law: The Eastern Land Claims*, 31 ME. L. REV. 1 (1979). For a journalistic discussion of these cases, *see PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBCOT INDIANS OF NEW ENGLAND* (1985).

4. Detailed evidence from such sources as local papers, town meeting records, and the like suggests that while the Mashpee were in fact living as the Native American tribe that they are, the defendants recognized them as such. One of the defendants' first steps in planning its litigation strategy was to accept an invitation to fly to Montana to work with Montanans Opposing Discrimination (MOD), then an affiliate of the Interstate Congress of Equal Rights and Responsibilities, but now an affiliate of Citizens Equal Rights Alliance (CERA), which is headed by William Covey of Big Arm, Montana.

The ICERR and CERA are anti-Indian organizations. They espouse equal rights for all Americans by opposing what they call "special rights" for any group, particularly Native Americans. Since 1975 ICERR has strongly opposed and worked to defeat Indian claims of all sorts, including the Mashpee tribe's claim. It has also promoted anti-Indian legislation. *See A Backlash Stalks the Indians*, BUS. WK., Sept. 11, 1978, at 153; Richard Boethe et al., *A Paleface Uprising*, NEWSWEEK, Apr. 10, 1978, at 39; MAZER, *supra* note 2, at 233-36, 352.

One infamous ICERR bill was the "Native American Equal Opportunity Act," which was introduced by Rep. Jack Cunningham (R-Wash.). This bill would have abrogated all treaty rights between Indian tribes and the United States; closed all Indian hospitals, schools, and housing projects; done away with Indian fishing and hunting rights; shut down the Bureau of Indian Affairs; and ended U.S. trust responsibilities toward Native American tribes. Rep. Cunningham introduced his bill by announcing: "My bill would restore the independence and dignity of the native American by freeing him from the socially destructive paternalism of the federal government." Bill Peterson, *Behind the Walk: A Protest Against 'Backlash' Bills*, WASH. POST, July 12, 1978,

organization whose aim was to help "free" American Indians from any "special rights" they might have or acquire under federal law. ICERR carried out its aim by promoting anti-Indian litigation and legislation under the banner that recognizing special rights for American Indians would only prevent them from shouldering their "responsibilities" under state law.

One month before trial, the Mashpee asked the court to delay the legal process so that the Bureau of Indian Affairs (BIA) could determine the tribe's status according to its administrative expertise. The Mashpee trial court judge denied this request on the theory that the issue of tribal status was well within a lay jury's decisionmaking power since it concerned the human condition.<sup>5</sup> But while the all-white jury decided against the tribe in a trial at which the defendants racialized the Mashpee claim for tribal status,<sup>6</sup> the case

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at A1. *See also* Dennis A Williams et al., *Teepees on the Mall*, NEWSWEEK, July 31, 1978, at 27.

Another ICERR bill, the "Omnibus Indian Jurisdiction Bill," was introduced by Rep. Lloyd Meeds (D-Wash.). This bill would have limited, if not eliminated, tribal criminal jurisdiction over non-Indians and non-member Indians on the reservation, and it would have limited tribal jurisdiction over member Indians on the reservation. Rep. Meeds said about this bill: "In today's chaotic setting, . . . if you resided on an Indian reservation, as do thousands of non-Indian Americans, your land would probably be subject to zoning, taxation and other regulations by tribal authority for which you have no rights to representation." Peterson, *supra*.

Ironically, one of the defendant's representatives (an unnamed selectman from Mashpee, Massachusetts), who claimed the Mashpee were not an Indian tribe, started an east coast ICERR chapter. William Chapman, *Indian Tribes Arise; Indian Tribal Nationalism is Reborn*, WASH. POST, Jan. 31, 1977, at A1.

Thus, in a sense, the defendants acknowledged the plaintiff's Native American-ness, but only in non-legal, non-public fora. In the town of Mashpee, the defendants ridiculed plaintiff's claims to Indian status, but in fighting the lawsuit gave it serious consideration by requesting the advice of established anti-Indian organizations. In addition, the eastern landclaim cases, a group of cases which eventually included *Mashpee*, were cited by ICERR as the reason for the Congressional movement away from Indian support. *See, e.g.*, Bill Curry, *Indians Seek to Guard Special Rights Against White Backlash*, WASH. POST, Apr. 16, 1978, at A6; Bill Richards, *Hill Cools in Attitude on Indians*, WASH. POST, Oct. 9, 1977, at A1.

5. *See* JACK CAMPISI, THE MASHPEE INDIANS: TRIBE ON TRIAL 57 (1991) for a description of Judge Skinner's insistence that deciding the issue of tribal status was within the purview of the jury. This discussion came to the fore because the Mashpee had filed for a BIA determination of tribal status at the time of trial. The petition was originally filed on July 7, 1995, as recorded in 44 Fed. Reg. 116 (1979). Hence, the tribe moved that the trial be postponed pending the BIA's determination; their motion was denied. They brought another petition before the BIA after the Supreme Court denied certiorari on their claim. That petition is still pending. See *infra* note 93 and accompanying text.

6. The defendants argued that because the Mashpee had intermarried with African Americans, they could not be an American Indian tribe; that is, the defendants tried to convince the jury that the Mashpee's Indian blood quantum had been diluted by their intermarriage with non-Indians, and particularly with African Americans. While all of the commentators cited in this Article remarked on the racialized aspect of the trial, Rona Sue Mazer, then a graduate student who dutifully attended every day of the trial, best described this aspect of the trial as follows:

It is significant that the defense focused for the most part on intermarriage with Blacks and not with Whites. Such an interest in the amount of Black intermarriage specifically can be interpreted as an emotional appeal to latent racial prejudices which may have existed among members of the jury. It is important to note here that in addition to determining the substantive issues addressed

is still not over. In 1990, the Mashpee Wampanoag tribe of Mashpee, Massachusetts completed its resubmitted petition for federal recognition before the BIA; but that petition, which was postponed for obvious deficiencies, is still pending.<sup>7</sup> While the BIA has recognized two other tribes with histories similar to the Mashpee—the Narragansett Indian Tribe of Rhode Island, and the Wampanoag Tribal Council of Gay Head, Massachusetts—and Congress has recognized one other—the Western (Mashantucket) Pequot Tribe of Connecticut<sup>8</sup>—the long delay in the Mashpee case has meant that the land and resources that the Mashpee sued to regain and protect have been inalterably developed, and the racial tensions that the defendants helped to foment continue on.<sup>9</sup>

This Article reconsiders the case of the Mashpee. Part One details the law on federal tribal recognition that the jury was asked to apply. I argue that this law, which was first fashioned in the late nineteenth century, continues to confuse tribal adaptations to colonial society with tribal assimilation into the mainstream on the theory that the “primitive” will inevitably give way to the “modern.” Part Two analyzes the scholarly views that emerged to propose solutions for counteracting this evolutionist assumption in the law. One view argued that the law ought to presume American Indian views of property to be irreconcilably different from non-Indian views, regardless of any factual evidence to the contrary.<sup>10</sup> The other warned against the use of rigid either-or categories by suggesting that *Mashpee* was primarily about a community’s right to define its own cultural identity, and that this issue was unrelated to questions about the future use of land. Despite their differences, both views agreed that law and the legal process prevented the Mashpee from telling their story, hence Part Three of this Article looks briefly at how such a disarticulation might have taken place. In this Part, I argue that had the Mashpee been able to tell their story, land use would have figured prominently as a theme, especially given that the tribe regarded the shore and its resources as a commons whereas the non-Indian sector of Mashpee regarded the same area as private property to which the record owner ought to have exclusive access. Part Four examines the particulars of how the waterfront areas of Mashpee moved out of Mashpee hands, and later out of Mashpee political control, but never out of Mashpee hearts. And the conclusion highlights

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by the defense during the trial, this concern with race at times seemed to affect St. Clair’s personal perceptions. At one point in the trial, attorney St. Clair reminded a witness that he was dealing with “white man’s law.” The witness responded by saying that he had thought it was “American law.” This incident provoked an outburst in the courtroom and almost resulted in the exclusion of all observers. Such an occurrence deserves note in that it was witnessed by the jury and the observers and was an integral part of the trial proceedings.

MAZER, *supra* note 2, at 287.

7. BRANCH OF ACKNOWLEDGMENT AND RESEARCH, BUREAU OF INDIAN AFFAIRS, SUMMARY STATUS OF ACKNOWLEDGMENT CASES (as of Mar. 1, 1995) [hereinafter SUMMARY].

8. *Id.*

9. Patricia Smith, *Gentle Bear was Warrior*, BOSTON GLOBE, Sept. 16, 1994, at 33 (noting that in the post-trial atmosphere of Mashpee, Native people in Mashpee are often referred to as “monig,” for “more n---- than anything”).

10. Ironically, this view comported with Judge Skinner’s idea that distinct Indian communities were those that had never integrated into the American mainstream: a standard impossible even for the least “integrated” federally recognized tribes to meet.

similarities between what happened in *Mashpee* and what happens in Indian Country generally.

### I. AMERICAN INDIAN OR NOT?: THE DOCTRINAL VIEW OF MASHPEE

In the 1913 case of *United States v. Sandoval*,<sup>11</sup> the Supreme Court was faced with the question of whether Congress had the power to prohibit the transport of liquor onto Pueblo Indian lands. Before the Court could decide if Congress's action fell within its broad power over Indian tribes, however, it had to decide whether the Pueblos were "Indians" in the legal sense of the word. The Court was challenged by this problem because there was conflicting precedent on the Pueblos' status. On the one hand, the Pueblos, who are the Keresan and Tewan peoples of the Rio Grande Valley, owned their land in fee simple absolute. This ownership distinguished them from so-called "reservation Indians" who held aboriginal title to land ultimately owned by the United States.<sup>12</sup> In addition, a prior case, *United States v. Joseph*, had held that the Pueblos were not a tribe for federal Nonintercourse Act purposes.<sup>13</sup> This holding was based on what the Court regarded as "the degree of civilization [the Pueblos] had attained," as well as on "their absorption into the general mass of the population."<sup>14</sup> On the other hand, even though the Pueblos were described as possessing important characteristics regarded at the

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11. 231 U.S. 28 (1913). The Commissioner of Indian Affairs at the time *Sandoval* was decided was Cato Sells, who served from 1913 to 1921. Although Sells assumed that it was his administrative mandate to destroy tribal governments and "bring about the speedy individualization of the Indian," he was also a staunch prohibitionist. He reportedly told a delegate from the Indian Rights Association that the "greatest menace" to the American Indian was the liquor traffic in Indian country. Hence Sells took it as his personal aim to stop the sale of liquor in Indian country by putting an end to the bootleggers and saloonkeepers who made their living there, even if it meant postponing the agency's general goal of individualization. Sell's personal aim reflected a greater preexisting conflict about liquor, one that culminated in the forced resignation of Sell's predecessor, Robert Grosvenor Valentine (1909-1912), who was forced out of office because he introduced liquor into Indian country. *Sandoval* arose out of the swirl of conflict over Valentine's resignation. Lawrence C. Kelly, *Cato Sells, 1913-1921, in THE COMMISSIONERS OF INDIAN AFFAIRS, 1824-1977* [hereinafter COMMISSIONERS] (Robert M. Kvasnicka and Herman J. Viola eds., 1979).

12. The legal attributes of aboriginal title were first described in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). The quality of the United States' title to the land is contestable. *See, e.g.*, ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

13. 94 U.S. 614, 618-19 (1876). The Nonintercourse Act was one of the initial ways by which Congress stopped states from authorizing the sale of tribal land to individual owners. Under the Act, such sales were void, unless Congress granted approval to them. The 1789 Constitution gave Congress the power to pass the first Indian Nonintercourse Act, which it did on July 22, 1790. The Act stated that:

No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under authority of the United States.

*Quoted in* FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 511 (1982 ed.).

This provision, reenacted with minor modifications in the subsequent Trade and Intercourse Acts and Revised Statutes, is presently codified at 25 U.S.C. § 177 (1988). *See COHEN, supra*, at 512.

14. *Joseph*, 94 U.S. at 617.

time as non-Indian, a new wave of field agents and anthropologists reported that they still retained "old customs and [Indian] rules," which presumably took the place of law.<sup>15</sup>

That is, while *Joseph* held that Taos Pueblo had assimilated into the surrounding society (a Spanish-speaking society that was itself problematic to colonial officials), there were nevertheless distinct aspects of Pueblo culture that a later generation of observers would identify as clearly Indian. Pueblo religious calendars, for example, were extensive; according to one official, the religious calendar, rather than law, appeared to govern the Pueblos. Also, whites were excluded from the Pueblos during many ceremonial times, which, aside from being a clear affront to colonial power, had the practical effect of disrupting mail service and closing roads. To the colonial eye, this, too, was evidence of the prominence of religion and custom over law in Pueblo life.

The conclusion drawn from these observations was that because Pueblo practices appeared chaotic to colonial officials, Pueblo governors probably ruled by absolute force. From this conclusion flowed another: If the Pueblo governors ruled by absolute force, then the Pueblos lacked democratic legal and political systems, except as revealed in the crudest form of custom. The comments of one field official offer a good illustration of the colonial search for systems of law. This official complained that because of religious activities, the Pueblos led a life that was "little less than a ribald system of debauchery," a life full of practices that not even the Catholic Church—itself considered the epitome of New Mexican superstition—could stop.<sup>16</sup> Thus, the Pueblos, who according to *Joseph* had been identified as "locals" (non-Indians) for adjudicating land claims, became reidentified as "Indians" under *Sandoval* for prosecuting liquor distribution cases. Their legal reclassification from rural northern New Mexicans to distinct American Indian tribes came about more because of a shift in colonial perception, intellectual method, and policy than because of any shift in the federal law on American Indian tribal recognition.<sup>17</sup>

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15. *Sandoval*, 231 U.S. at 42.

16. This official wrote:

Santa Fe, 1905: "Until the old customs and Indian practices are broken among this people we cannot hope for a great amount of progress. The secret dance, from which all whites are excluded, is perhaps one of the greatest evils. What goes on at this time I will not attempt to say, but I firmly believe that it is little less than a ribald system of debauchery. The Catholic clergy is unable to put a stop to this evil, and know as little of same as others. The United States mails are not permitted to pass through the streets of the pueblos when one of these dances is in session; travelers are met on the outskirts of the pueblo and escorted at a safe distance around. The time must come when the Pueblos must give up these old pagan customs and become citizens in fact."

*Sandoval*, 231 U.S. at 42.

17. *Joseph* derived its information about Pueblo characteristics from the observations of the territorial judge who first heard the case. Forty-six years later, when *Sandoval* was decided in 1913, the Court was using what it considered to be more reliable sources of evidence such as field reports of local agents and professional anthropologists.

See *infra* notes 79 to 94 and accompanying text for a discussion of the hierarchy of what is considered reliable cultural evidence.

See also William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEG. HIST. 331 (1990) (discussing the historic ways in which the word "recognition" has been used relative to Indian tribes, noting that there was no exact moment when the

At the time of *Joseph*, in 1867, the law did not distinguish between the Pueblo communities and the rural Hispanic population of northern New Mexico in part because colonial observers were not cognitively attuned to Taos “Indian-ness” as compared to, say, Taos “Hispano-ness,” and in part because to deem the Taos Pueblo a federally recognized American Indian tribe would be to allow it to regain ancestral land under the federal Nonintercourse Act. This in turn would be in direct opposition to the federal government’s then-stated policy of assimilating American Indians into the mainstream through the individual allotment of tribal land.<sup>18</sup> And with respect to ethnographic method, *Joseph* relied on crude comparative models to reason that if a rural population was agricultural, as the Pueblos were, then somewhere in its midst one would find the signs of law, no matter how undeveloped.<sup>19</sup> By the time *Sandoval* was decided in 1913, however, colonial perceptions and theories of indigenous law-ways had changed. Officials recognized the Pueblos as Indian communities presumably because “recognized sources of information [had become] available” in the form of the field notes of officials and anthropologists.<sup>20</sup> This new wave of observers had taken the trouble to travel to “the field,” hence their copious notes of “primitive” practices were considered more reliable than the notes of their sedentary predecessors of the Aristotelian comparative era or of the colonial questionnaire era.<sup>21</sup>

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(jurisdictional sense of tribal recognition superseded the cognitive).

18. The Commissioner of Indian Affairs at the time, William P. Dole, who served from 1861-65, most likely influenced the adjudication of *Joseph*. Dole accepted the common notion of his day that American Indians lived a semi-nomadic existence, that this existence allowed tribes more land than they needed, and that a transition to farming would both “civilize” the American Indian and open up “surplus” land for white settlement. *See Harry Kelsey, William P. Dole, 1861-1865, in COMMISSIONERS, supra* note 11, at 89.

19. E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1954). Hoebel begins his discussion of the emergence of scholarly attention to indigenous law-ways by noting: Historians of law and analytical jurisprudes have told us, for instance, that nothing so refined and sophisticated, so well organized and logically perfected, nothing so authoritarian, so purposeful as law, could exist on the primitive level. Most anthropologists, until recently, have responded with a solemn nod. The legal life of primitive man was looked upon as being nonexistent rather than as simply unexplored.

*Id.* at 20. *See also* ANTHONY PAGDEN, THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY (1982) for an in-depth history of the prominence of the Aristotelian method of cultural comparison in the colonial era.

20. *Sandoval*, 231 U.S. at 49. The observations referred to as being absent in *Joseph* came from the reports of field superintendents and the writing of ethnologists like Adolf Bandelier. *See* Bandelier, Papers Arch. Inst. Am. Ser. Vol. 3, part 1 (1890); Bureau Am. Ethn. Reports, Vols. 11 (1889-90) and 23 (1902).

21. A short history of the intellectual development of indigenous law studies is set out in the first two chapters of HOEBEL, *supra* note 19. Hoebel narrates the historical development of indigenous law studies like this: First there was the crude comparative method founded on Aristotelian notions of culture and ideal form. *See, e.g.*, PAGDEN, *supra* note 19, for a more detailed treatment of this method.

Next came work initiated by A.H. Post (1839-1895) and Joseph Kohler (1849-1910). This work tried to move beyond the purely intellectual comparative method of the past. Post and Kohler’s method was novel because they formulated and distributed questionnaires for gathering information about indigenous law-ways. These questionnaires were typically filled out by colonial officers and missionaries. Organized by categories,

But regardless of the ethnographic method that informed thoughts about the law on tribal recognition, that law always had a humiliating and oppressive ring to it.<sup>22</sup> American

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like "Family and Personal Law, Property Law, Penal Law, and Procedural Law, the questionnaires posed questions in this vein: Does mother or father right prevail? i.e. Does the child follow the family of the mother or the father?" Hoebel reported that "one literal-minded missionary responded . . . 'When young, they follow the mother—in later years, the father.'" HOEBEL, *supra* note 19, at 31 (citing J.E. LIPS, NASKAPI LAW (TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY) 382 (1937)).

Next came works that glorified custom as a precursor of law; the implication of these works was that Native American societies lived under the sway of custom, not the working of law. *See, e.g.*, EDWIN SIDNEY HARTLAND, PRIMITIVE LAW (1924); WILLIAM SEAGLE, THE QUEST FOR LAW (1941) (acknowledging that Native American communities have incorporeal rights, but taking the position that such rights were not property rights, and hence that such communities did not have a concept of property). Cf. Robert H. Lowie, *Incorporeal Property in Primitive Society*, 37 YALE L.J. 551 (1928) (arguing that incorporeal property rights existed in Native American communities, and that such rights were property rights in the Hohfeldian sense of property governing the relationship between persons vis-à-vis a thing, rather than the relationship of a person with a thing). This particular debate foreshadowed the late twentieth century debate about the ownership of seeds and other natural resources, as did Hoebel's discussion of the debate. *See* HOEBEL, *supra* note 19, at 61-63 (discussing ownership in relation to the Plains visionary whose fasting and prayer allowed him to acquire four new songs and instructions on how to prepare a shield to be used with the songs). *See, e.g.*, Wade Davis, Ph.D., *Biodiversity: The Fabric of the Kin-Dom*, Tape # SOC-15, from Selected Audiotapes recorded live at the Seeds of Change, Fifth Annual Conference: The Bioneers: Practical Solutions for Restoring the Environment, held on Oct. 15-17, 1993, San Francisco, Cal.; Rebecca L. Margulies, *Protecting Biodiversity: Recognizing International Intellectual Property Rights in Plant Genetic Resources*, 14 MICH. J. INT'L L. 322 (1993); James O. Odek, *Bio-piracy: Creating Proprietary Rights in Plant Genetic Resources*, 2 J. INTELL. PROP. L. 141 (1994); June Starr and Kenneth C. Hardy, *Not By Seeds Alone: The Biodiversity Treaty and the Role for Native Agriculture*, 12 STAN. ENVTL. L.J. 85 (1993).

Hoebel next discusses the work of Malinowski, Barton and Rattray. These writers lived among indigenous groups for extended periods of time either as anthropologists or, as in Rattray's case, as government officials. Their method was novel because their narratives were heavily descriptive rather than based on a doctrinal ideology, or on questionnaires. *See* ROY F. BARTON, IFUGAO LAW (1919); BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA (1922); R.S. RATTRAY, ASHANTI LAW AND CONSTITUTION (1929).

Hoebel gave this history as a way of explaining how he and Karl Llewellyn instituted a method founded on the "trouble case." This method, based on the Hohfeldian framework of jural opposites, applied the case study approach to the study of indigenous law-ways. HOEBEL, *supra* note 19, at 46-63 (citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1916-17)). *See also* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941).

22. Which definition will determine whether a group constitutes an "Indian tribe" depends on the circumstances of the case, since the term has no widely accepted legal meaning. Nevertheless, multiple legal efforts in the form of acts, laws, and regulations have attempted to define Indian status in cases where easy reference to treaties, statutes or ratified agreements are lacking. For some landmark cases that address the issue, *see, e.g.*, United States v. Candelaria, 271 U.S. 432 (1926); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Joseph, 94 U.S. 614 (1876); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.

Indian communities were, by definition, "Other." As such, they were believed to either employ crude methods of law, or else be swayed by custom, with the implication being that those who lived by custom did not employ law at all. And no matter where an indigenous community fell on this law/no-law spectrum, it was assumed to have not yet

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1979); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

For landmark cases that address the issue in the context of the 1891 Indian Depredation Act, ch. 538, sec. 1, 26 Stat. 851, *see, e.g.*, *Montoya v. United States*, 180 U.S. 261 (1901) (holding that the words "tribe" and "band" are distinguishable, thereby allowing for the release of a tribe from liability for depredations carried out by a part, or "band," of that tribe); *Dobbs v. United States*, 33 Ct. Cl. 308 (1898) (identifying three broad ways of fixing tribal status: (i) definition by treaty; (ii) observations by Government officers; and (iii) autoethnographic statements); *Tully v. United States*, 32 Ct. Cl. 1 (1896) (holding that treaties were one of many possible ways to determine tribal status for purposes of the Act); *Graham v. United States*, 30 Ct. Cl. 318 (1895) (holding that a suit under the Act could be maintained where the tribe had a treaty with the United States that fixed its status as a tribe). More generally, Congress has broad power to recognize tribes and thus bring them within the full range of the federal trust responsibility. *See United States v. John*, 437 U.S. 634 (1978); *see also COHEN, supra* note 13, at 3-27.

But the definition in *Montoya* is often invoked when there is no clear evidence of Congressional recognition. It is frequently quoted as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya*, 180 U.S. at 266. It bears noting that the *Montoya* standard was articulated at the height of the Post/Kohler questionnaire movement, discussed *supra* note 21. The effect of this Post/Kohler method is also seen in *Sandoval*, where the Court quoted field notes from colonial observers verbatim.

*Mashpee* relied on the *Montoya* standard, with the First Circuit Court of Appeals completing the circle by noting that it was preferable not to adopt the trial court judge's "word-for-word" definition of tribe as a "true" definition. *Mashpee*, 592 F.2d at 587-88. Even for those who think the concept of tribal identity can be reduced to a neat verbal formula, refusal to rely on the trial court judge's definition turned out to be a blessing in disguise. As Jack Campisi noted, the trial judge, Judge Skinner, "a graduate of Harvard Law School and a Nixon appointee who had won high praise as a jurist [but whose] knowledge of contemporary American Indian societies . . . verged on the nonexistent," was himself confused about the meaning of the concept. CAMPISI, *supra* note 5, at 18. The judge's confusion was apparent at the close of the trial. But, rather than faithfully adhering to anthropological or ethnohistorical definitions of the term "tribe" (definitions that would have favored the plaintiff by taking into account the fact of acculturation), Campisi told how the judge made up his own definition so that there was "something for everyone." CAMPISI, *supra* note 5, at 57. As part of his definition, the judge distinguished between the proprietorship and plantation forms of ownership, a distinction that "however erudite . . . ignored that both systems were imposed on the Mashpees to serve the conveniences of the Crown and commonwealth." CAMPISI, *supra* note 5, at 56. Said Campisi, "The court created a false and meaningless dichotomy and provided the jury with a spurious but important distinction from which it could imply tribal abandonment." CAMPISI, *supra* note 5, at 56. This, apparently, is exactly what the jury did.

The issue of tribal recognition is now decided by administrative process under 25 C.F.R. § 83 (1978) and its revision, 25 C.F.R. § 83 (1994). The Branch of Federal Acknowledgment and Research, which holds the administrative procedure to decide whether or not a tribe will be recognized by the federal government, is staffed by two ethnohistorians, two cultural anthropologists, and one certified Native American Lineage Specialist. *See William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37 (1992).

attained the degree of legal sophistication that the surrounding culture attributes to itself.<sup>23</sup> Thus under *Montoya*, which set the most general standard for determining tribal status,<sup>24</sup> an Indian tribe was defined as “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”<sup>25</sup> And under *Sandoval*, Indians were defined as “[a]lways living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, . . . essentially a simple, uninformed, and inferior people.”<sup>26</sup>

*Montoya* was applied for the first time in *United States v. Candelaria*, yet another case addressing the problematic line between local and Indian identity in Pueblo country.<sup>27</sup> In *Candelaria*, the issue was whether the Pueblos—who after *Joseph* were not recognized as Indian for Nonintercourse Act purposes, but who after *Sandoval* were recognized as Indian for federal liquor law purposes—could now be considered an Indian tribe under the Nonintercourse Act in light of newly acquired accounts of field officers and ethnographers.<sup>28</sup> Incorporating these accounts as they appeared in *Sandoval*, the *Candelaria* court used them to support the opposition that served as *Montoya*’s conceptual framework. This opposition pitted governance by custom (which was associated with primitiveness) against governance by law (which was associated with modernity). Relying on this descriptive body of colonial narrative, then, *Candelaria* held that the Pueblos were, as of 1925, a distinct Indian tribe for Nonintercourse Act purposes because “although [the Pueblos were] sedentary, industrious and disposed to peace, they are

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23. The idea that American Indian communities had not yet attained the degree of law that the surrounding community “enjoyed” assumed that they could “evolve” to such a degree with the right instruction. Hence, it became federal policy under Commissioner Dole to place the proceeds from the sale of “surplus” Indian land into trust funds to help pay the cost of educating American Indians in the ways of white society. See Kelsey, *supra* note 18. In another sphere, in a widely-cited A.B.A.-sponsored study, Samuel J. Brakel concluded that tribal courts are inferior courts. AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978). For more specific discussions meant to counter that view, see, e.g., Martin M. Pacheco, *Finality in Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119 (1991) (arguing that the non-Indian perception of Indian justice is biased; calling for the creation of a federal Indian Court of Appeals); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts* 56 U. CHI. L. REV. 671 (1989) (noting the importance of tribal courts to the society at large); Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15 (1992), and *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989) (containing descriptions of Navajo courts by Chief Justice Tso of the Navajo Supreme Court); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994) (defending tribal courts by arguing that they can serve the important function of a laboratory for national jurisprudence); Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271 (1993) (providing thoughts on law school training by Chief Justice of the Navajo Supreme Court).

24. See *supra* note 22 and accompanying text.

25. *Montoya*, 180 U.S. at 266.

26. *Sandoval*, 231 U.S. at 39.

27. 271 U.S. 432 (1926).

28. For a description of the Nonintercourse Act, see *supra* note 13.

Indians in race, customs and domestic government.”<sup>29</sup> In other words, despite their agricultural economies, they lacked law and the understanding of property that comes with it; hence, they constituted American Indian tribes under the Nonintercourse Act, a federal act meant to ensure federal preeminence in Indian affairs, and especially in Indian land affairs. After *Candelaria*, the Pueblos were entitled to federal Nonintercourse protection despite *Joseph*, which had earlier declined to extend such protection. Commentators treated this discrepancy by explaining that *Joseph* had not been overruled, but rather now stood for the proposition that unrecognized tribes had an ephemeral sort of federal protection as compared to federally recognized tribes, meaning that the Pueblos, who were unrecognized tribes at the time of *Joseph*, had actually acquired a more secure status under *Sandoval* and *Candelaria* by virtue of gaining federal recognition.<sup>30</sup>

By 1976, when the federally unrecognized Mashpee tribe brought its claim in federal district court, echoes of the Pueblo cases haunted the litigation. To those who had only abstract knowledge of the Mashpee, they seemed indistinguishable from the local, non-Indian population; but to those with detailed knowledge of the Mashpee and the situation in the town of Mashpee, it was apparent that they were indeed a Native American community. What made acknowledging the Mashpee’s Indian-ness daunting from a non-Indian perspective, however, was that *Mashpee* was similar to *Candelaria* in the sense that the tribe was suing under the Nonintercourse Act to invalidate sales of land that had been made in the nineteenth century without the consent of Congress.<sup>31</sup> On this point, the Mashpee argued that they were entitled to the return of their land because they had not received the federal protection to which they had been (and still were) entitled, with the consequence being that they had lost title to their aboriginal land.<sup>32</sup> The defendants responded to the Mashpee claim with a motion to dismiss,<sup>33</sup> a strategy meant to postpone the question of who owned the land in Mashpee until a court could first decide whether the Mashpee plaintiff group was a “tribe” in the legal sense of the word.<sup>34</sup>

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29. *Candelaria*, 271 U.S. at 441-42, relying on *Sandoval*, 231 U.S. at 45-47.

30. See, e.g., Note, *The Unilateral Termination of Tribal Status: Mashpee Tribe v. New Seabury Corp.*, 31 ME. L. REV. 153 (1979) (illustrating one effort to reconcile *Joseph*, *Sandoval*, and *Candelaria* by a contextual legal analysis); cf. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW (3d ed. 1993) (offering a more contextualized view of the above cases with reference to the Pueblo Lands Act, 43 Stat. 636 (1924) (a statute meant to resolve claims by non-Indians to Pueblo lands), and the fact that the approximately two million acres of Pueblo lands held in fee simple absolute are nevertheless defined as Indian Country under 18 U.S.C. § 1151(b)).

31. *Mashpee*, 447 F. Supp. 940.

32. For a description of the current BIA procedure for deciding these issues, see *supra* note 22.

33. Defendant’s motion was filed pursuant to FED. R. CIV. P. 12(b)(6), (7) & 19. The specific motion to dismiss for failure to state a claim upon which relief could be granted was predicated on plaintiff’s failure to plead federal recognition as an Indian Tribe. The defendants argued that absent such recognition the plaintiff could not proceed with its claim for the return of land alienated in violation of the Nonintercourse Act because the Act was one that extended protection only to federally recognized tribes. For a detailed description of the defendants’ strategy, see James D. St. Clair & William F. Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91 (1979).

34. Several commentators noted this strategy in their own treatment of the case. See CAMPISI, *supra* note 5, at 65; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW

The defendants claimed that because the plaintiff had no formal relationship with the federal government, it was not entitled to federal Nonintercourse Act protection. Agreeing with the plaintiff's point that *Montoya*, and thus by implication the *Joseph*, *Sandoval*, and *Candelaria* line of cases, controlled, defendants argued that the plaintiff was required to prove four elements in order to secure its federal tribal status.<sup>35</sup> The first was that it was made up of persons of the same or similar race; this was problematic since the Mashpee had intermarried with other groups over the course of European contact. The second was that the Mashpee had a distinct political leadership (or government); this was at issue since the tribal and town government had been synonymous for over a century. The third was that the Mashpee tribe was socially and culturally distinct from non-Indians in the area; this too was at issue since the Mashpee had adopted substantial aspects of American material culture. And the fourth was that the Mashpee tribe inhabited a particular area, or territory, an element that was also contested given that the Mashpee first acquired title to the land with the help of an English missionary.<sup>36</sup> Furthermore, the plaintiff had to prove these four elements at two distinct points in time: at the time the lawsuit was filed in 1976; and using historical methods, at the time the illegal transfers of land had been made.<sup>37</sup>

Also at issue in *Mashpee* was the procedural question of who ought to bear the burden of proving whether the tribe had voluntarily abandoned its tribal status.<sup>38</sup> On this issue, the *Mashpee* plaintiff took the position that (1) federal protection could not be terminated under federal law except through either an act of Congress or complete, voluntary abandonment of tribal status by the community, and (2) because the Mashpee group was a tribe (recognized or not) the burden of proving that they had voluntarily abandoned their tribal status lay with the defendant.<sup>39</sup> The defendants, on the other hand, asserted that it was the plaintiff's burden to prove that the Mashpee were a tribe, or if not,

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365 (1990).

35. The actual language is:

By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design.

*Montoya v. United States*, 180 U.S. 261, 266 (1901).

The plaintiff had the burden of proof on the issue of tribal status. Plaintiff appealed this placement of the burden. For a detailed discussion of this procedural issue, see CAMPISI, *supra* note 5, at 63-64. Cf. St. Clair & Lee, *supra* note 33.

36. YASUHIDE KAWASHIMA, PURITAN JUSTICE AND THE INDIAN: WHITE MAN'S LAW IN MASSACHUSETTS, 1630-1763, at 58 (1986) (noting that Richard Bourne, a white minister, bought a 16-square-mile piece of land from the native owners for the benefit of the Mashpee Indians).

37. Plaintiff had to rely on historical methods to prove that its predecessors in interest constituted an Indian tribe, again under *Montoya*, at the time the illegal land transfers were made. See *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); CAMPISI, *supra* note 5; FRANCIS G. HUTCHINS, MASHPEE, THE STORY OF CAPE COD'S INDIAN TOWN (1979).

38. See CAMPISI, *supra* note 5; Note, *supra* note 30. Cf. St. Clair & Lee, *supra* note 33.

39. *Mashpee*, 592 F.2d at 585, relying on *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976).

that the community had been coerced into abandoning its tribal status.<sup>40</sup> According to the defendants, there were three ways in which a tribe could cease being a tribe: an act of Congress; complete, voluntary abandonment; and assimilation.<sup>41</sup> Only Congress had the power to terminate its trust responsibility toward a tribe, the defendants argued, but only a tribe had control over whether it would abandon its status or assimilate.<sup>42</sup> And if a tribe decided to assimilate, even if gradually (and unwittingly) over time, that decision was nonetheless voluntary, even if only constructively so.

To support this argument, the defendants implicitly urged the court to recognize an evidentiary spectrum on the issue of assimilation that implicated issues of power, agency, consciousness, and historical proof. They pointed out that at one extreme were the cases in which Congress exercised its power to terminate Nonintercourse Act protection, and thereby force indigenous assimilation into the mainstream. These were clear cases in terms of the sort of proof they required because somewhere in the record one would find

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40. The court noted:

The importance of the burden of proof is minimized in this case because each party presented some evidence relevant to the voluntariness of the tribe's change in status. Therefore, it is unlikely that the issue was decided for lack of evidence. The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendant's interpretations of historical data.

*Mashpee*, 592 F.2d at 590.

41. Defendants claimed that the assimilation element of its argument was implied from the "white settlement" exception to the Trade and Intercourse Act of 1834. The gist of the white settlement exception was the assumption that if an Indian community had become surrounded by non-Indian communities, then a court could infer that the Indian community had assimilated into the non-Indian communities. That is, the defendant argued that Justice McLean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 589 (1832) noted that the power to regulate intercourse with "remnants, fragments, or remains" of Indian tribes that had lost the power of self-government was beyond the scope of the various Trade and Nonintercourse Acts, and specifically of § 19 of the 1802 Trade and Nonintercourse Act. *Id.* This section excepted "Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states" from Nonintercourse Act protection. Act of March 30, 1802, ch. 13, sec. 19, 2 Stat. 139, 145. The defendant argued that when the Nonintercourse Act of 1834 repealed the 1802 Act, it did not "impair or affect the [white settlement exception to the] intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi"; and, therefore, that because the Mashpee were a remnant tribe living east of the Mississippi, the 1834 Act did not extend its protection to them because they had assimilated. Act of 1834, ch. 161, sec. 29, 4 Stat. 729, 734. This argument was made in the form of a motion for a directed verdict on the ground that the Nonintercourse Act did not control.

The *Mashpee* trial court denied the defendants' motion on the ground that § 19 of the 1802 Act applied only to exclude the land of individual, non-tribal Indians from Nonintercourse Act protection, and the defendant appealed. The First Circuit Court of Appeals affirmed the trial court's decision. *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.*, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). For further discussion of Justice McLean's opinion, see James Lobsenz, *Dependent Indian Communities: A Search for Twentieth Century Definition*, 24 ARIZ. L. REV. 1 (1982). See also St. Clair & Lee, *supra* note 33, at 100-01.

42. *Mashpee*, 592 F.2d at 575; St. Clair & Lee, *supra* note 33, at 107-13.

evidence of congressional or executive intent.<sup>43</sup> These cases were the most rule-oriented, since no knowledge of anthropological detail was necessary in order to render a decision.<sup>44</sup> Next were the cases in which a tribe exercised its power to voluntarily (and presumably consciously) abandon its tribal status. These cases were more difficult than congressional termination cases because they could be proved (or disproved) with a myriad of evidence showing conduct from which voluntariness could be inferred. This sort of evidence might be as faint as the adoption of European "labels" and "forms" of government, or as blatant as a formal statement made by a tribe of its intent to abandon its status.<sup>45</sup>

Finally, came the assimilation cases, which were the most difficult. In these cases, a tribe could remove itself from federal Nonintercourse Act protection by slowly and progressively "evolving" into a community that was indistinguishable from the surrounding local (non-Indian) community. These cases were proved either through implication of law,<sup>46</sup> or with more general historical and anthropological evidence. This evidence might include descriptions of how the tribe had adopted European "labels" and "forms," or it could be more "everyday" in describing how Native American custom gradually had been replaced either by American law or custom.<sup>47</sup>

In this way, the defendants' argument paralleled what had been the doctrinal, historical, and intellectual movement of the federal law generally. The framework of the rules was such that custom was implicitly opposed to law: Communities that governed themselves by "custom" were by definition "Indian"; communities that governed themselves by "law" were by definition "non-Indian." And the assumption underlying the framework was that the movement from custom to law could only be explained as an evolutionary embrace of order, predictability, and process by the assimilating Native

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43. The Menominee Tribe of Wisconsin is an example of a tribe that was terminated pursuant to an Act of Congress. Menominee Indian Termination Act of 1954, Pub. L. No. 84-399, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902 (1970)).

44. Martha Minow aptly describes this process. She writes:

By the time a case reaches an appellate court, the adversaries have so focused on specific issues of doctrinal disagreement that the competing arguments have come under one framework, not under competing theories. Opposing arguments become counters in a game rather than efforts to craft new understandings of a difficult problem. Legal analogies become narrow references to precedents, telescoping the creative potential of a search for surprising similarities into a limited focus on prior ruling that could "control" the instant case. As a result, fabricated categories assume the status of immutable reality. Of course, law would be overwhelming without doctrinal categories and separate lines of precedent. But by holding to rigid categories, the courts deny the existence of tensions and portray a false simplicity amid a rabbit warren of complexity.

MINOW, *supra* note 34, at 370.

45. Judge Skinner described abandonment to the jury as conduct that could theoretically include the adoption of English "forms" and "labels." Trial Transcript at 40-51, *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978). See CAMPISI, *supra* note 5, at 56 for a discussion of how Judge Skinner applied this idea at trial. See also Note, *supra* note 30.

46. See *supra* note 41.

47. See, e.g., *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28 (1913).

American community. Because of the evolutionary aspect of this assumption, it was further thought that when a community moved from custom to law, no matter how gradually or unwittingly, that movement was by definition voluntary because it constituted an inevitable shift away from primitivism and toward modernism. Thus what determined assimilation under the law was a complicated set of oppositions meant to describe how power was exercised (chaotically, or in an orderly fashion), how identity was constructed (as one governed by superstition and custom, or law), and how consciousness was communicated and recorded (orally, or in writing). In these oppositions the former set was defined as Indian, and on the decline; the latter as modern and on the rise. These were the rules, schemes, and oppositions upon which the anti-Indian forces relied in *Mashpee*.

## II. DIFFERENT OR NOT?: THE LITERATURE ABOUT MASHPEE

To summarize the above discussion, the law on tribal identity was one that created and enforced a system of biases. According to this system, "Indian-ness" was opposed to "non-Indian-ness," and was proven by reference to ethnographic as opposed to autoethnographic sources. In addition, the local was opposed to the Indian as evidenced by the way in which anthropological and historical evidence about Indian identity and rights became irrelevant in the face of non-Indian property rights. Thus in cases like *Mashpee* where the tribe sought return of title to land, the law was more inclined to interpret the *Joseph/Montoya* line of cases as requiring a strong, apparent showing of "Indian-ness."<sup>48</sup> Without this showing, the assimilation standard, which only arguably was imbedded in the law on tribal recognition, applied to return the case from the realm of federal Indian law to that of state property law.

The law review literature noted these biases in the substantive law and took an even broader view of the matter. One often-cited theoretical article emerged about *Mashpee: Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case* by Gerald Torres and Kathryn Milun.<sup>49</sup> Torres and Milun argued that the legal system, its rules of

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48. In *Mashpee*, this application was indeed the case. Judge Skinner repeatedly linked issues of identity and land, for example:

I think that you have got a constitutional question, really. You (Margolin) are saying that somebody who sells his land in 1842 fully and freely and for fair consideration with full knowledge, and being otherwise an adult human and so on, can get it back just for the say so 150 years later, and that rather severely distinguishes that group from the rest of the population; and, if you are going to make that distinction as a constitutional question, you have to show that there is a real honest-to-God difference between that group and everybody else; and, you know the remedy you are seeking is a very radical remedy. It seems to me quite proper to say that whoever seeks that remedy has got to show that they are a radically different kind of status than other people.

Trial Transcript 38 at 190-91, *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978).

49. Gerald Torres & Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990). See also Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761-66 (1993) (discussing "the violence done to the Mashpee and other oppressed groups [resulting] from the law's refusal to acknowledge the negotiated quality of

evidence and its use of precedent, rendered it unable to suppress its anti-Indian bias, and hence unable to hear the call of the Mashpee story.<sup>50</sup> In Torres and Milun's theoretical construct, "hearing the call of the Mashpee story" was a call for a presumption that would operate in favor of acknowledging tribal status. While this suggestion corresponded with the plaintiff's argument on appeal, it was nonetheless considered novel in the scholarly literature because of what it posited about American Indian culture(s). According to Torres and Milun, American Indian culture(s) was/were by definition irreconcilably different from mainstream American culture; but given that this irreconcilability could not be proven because of the legal system's preference for ethnographic, as opposed to autoethnographic, forms of evidence, it ought to be presumed as a matter of law.<sup>51</sup>

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identity"); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 624-26 (1995) (analyzing *Mashpee* in terms of applying postmodern theory to statutory interpretation).

Minow also dealt with *Mashpee*, and like Torres & Milun, Minow relied on James Clifford's work for her analysis. MINOW, *supra* note 34, at 351-56. *See also* Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991) (discussing the negotiated quality of identity).

50. Although Torres & Milun do not rely on ROBERT COLES, THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION (1989), their article parallels Dr. Coles's book. In "Stories and Theories," for example, Coles describes the difference in approach between his two residency supervisors, Dr. Binger and Dr. Ludwig. Dr. Binger was regarded by his students as intensely theoretical; Dr. Ludwig as somewhat of an anti-theorist. One day Dr. Ludwig suggested the following to Coles:

"The people who come to see us bring us their stories. They hope they tell them well enough so that we understand the truth of their lives. They hope we know how to interpret their stories correctly. We have to remember that what we hear is *their story*.

"Remember, what you are hearing [from the patient] is to some considerable extent a function of *you* hearing. . . .

"In a manner of speaking," Dr. Ludwig added, "we physicians bring *our* stories to the consultation room—even as," he pointedly added, "the teachers of physicians carry *their* stories into the consulting rooms where 'supervisory interaction' takes place. Sometimes our knowledge and our theories (the two are not to be confused with each other !) interfere with or interrupt a patient's momentum; hence the need for caution as we listen and get ready to ask our questions. The same was true for the 'case presentations' I was making to my supervisors: I formulated my account of a patient to a particular supervisor in keeping with the way I presumed that doctor was inclined to think with respect to psychological matters. The story I told would be affected by his mind's habits and predilection, *his story*."

COLES, *supra*, at 7, 15, 24.

51. Torres & Milun, *supra* note 49, at 631-32, 658 (considering orality as one of the aspects of Native American culture responsible for the irreconcilable difference). The suggestion of a presumption in favor of tribal status has been made before. *See, e.g.*, Terry Anderson, *Federal Recognition: The Vicious Myth*, 4 AM. INDIAN J., May 1978, at 7, 19. Cf. Quinn, *supra* note 22, at 54-55 n.63 (arguing that under the new BIA process, petitions for tribal acknowledgment are apparently regularly opposed by other tribes, and noting that the Tulalip tribe opposed the Samish and Snohomish petition and the Navajo Tribe opposed the San Juan Southern Paiute claim for federal recognition).

The intellectual foundation of Torres and Milun's work was James Clifford's essay, *Identity in Mashpee*, an insightful description and analysis of the Mashpee case.<sup>52</sup> Torres and Milun's reliance on Clifford's work presented Clifford's observations about the anti-Indian biases of the legal system in a procedural light. Clifford's first observation concerned the importance of methodology in arguing one's case.<sup>53</sup> He noted that since there were many ways to begin, tell, and end the Mashpee "story," the "history" one told depended on whether one focused on what the documentary record revealed (as the defendants' historian Francis Hutchins did)<sup>54</sup> or on what that record revealed and failed to reveal (as the plaintiff's experts James Axtell and Jack Campisi did).<sup>55</sup> Methodologies that focused on both utterances *and* silences left the expert witness more able to convey the undocumented aspects of Mashpee history; methodologies that focused only on positive utterances minimized, or worse overlooked, these same important aspects.<sup>56</sup> In *Mashpee*, this focus made a critical difference, as illustrated by how Hutchins and the plaintiff's experts arrived at radically different conclusions by analyzing the same general body of evidence.<sup>57</sup>

Hutchins interpreted the Mashpee use of English and later American governmental forms, language, and material items as evidence that the Mashpee had voluntarily abandoned their Indian identity, or at least assimilated into American culture, even if at the lowest rung of the local class and race hierarchy. He regarded the Mashpee Wampanoag cultural revival of the 1920s as born of a mixture of economics, pride, and the complex psychology that results when ethnicity is relegated to public display because the quest for assimilation into the American mainstream is the thread that more fully makes up the fabric of daily life. Hutchins's position was that the historical record revealed how the Mashpee display of "Indian-ness" paralleled white fantasies more than anything authentic. This position, he noted, was confirmed by the Mashpee tribal

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52. *Identity in Mashpee*, in JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988) [hereinafter PREDICAMENT].

53. CLIFFORD, *supra* note 52, offers the best discussion of the different ways that *Mashpee* could have been seen, the different stories that it represented, and how different methodologies produced those stories.

54. HUTCHINS, *supra* note 37.

55. CAMPISI, *supra* note 5.

56. The ultimate irony of all of this was described by the plaintiff's expert witness Vine Deloria, Jr., who noted: "You don't really study tribes. You work with the people to help them prepare the best understanding you can of what the current problems are, [and] how they got into the situation they got into. . . . And there's no really good history on any tribe in the country." Record at 16:109, *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

This methodological split was important to the issue of political organization. *See generally* CAMPISI, *supra* note 5.

By entering the universe of legal discourse, the term "Tribe," in the context of the Non-Intercourse Act, has no meaning for the internal perspective of people claiming that status. Instead, "Tribe" means a groups of indigenous people who have structured their existence in such a way that outsiders, specifically legal experts, would say the grouping is a "Tribe." Thus the legal notion of "Tribe" contains within it projected ethnological categories as well as political categories.

Torres & Milun, *supra* note 49, at 655.

57. HUTCHINS, *supra* note 37; *cf.* CAMPISI, *supra* note 5.

members who appeared in court, unsure of their identity, and looking rather more non-Indian than Indian. According to Hutchins, “[I]f Buffalo Bill needed bareback riders for his Wild West Show, [then] mild-mannered Eben Queppish of Mashpee was willing to pretend to be a Wild Western Indian, even though he didn’t know how to ride a horse to begin with, and hated it once he learned.”<sup>58</sup> Similarly, if the plaintiff needed “Indians” to further its legal agenda, there would be witnesses willing to testify from the position of their recently discovered (and inauthentic) cultural perspective.<sup>59</sup> Thus, Hutchins concluded: Mashpee “Indian-ness” was a recent and constructed phenomenon in Mashpee; Mashpee cultural identity was more or less a few recipes; and these together did not and ought not make the Mashpee a tribe (or Indian nation) under federal law.<sup>60</sup>

Campisi noted how the plaintiff’s experts had read the same record differently.<sup>61</sup> To them it revealed how the Mashpee had experienced nearly every phase of Indian history in their struggle to maintain their Indian ways. They survived missionaries, disease, corrupt guardians, land speculators, the death of their language, and political structural changes initiated at the whim of the colony and later the state. Campisi, for example, concluded that the ways in which the Mashpee seemed to have assimilated into the American mainstream were veneers covering a tribal core that was detectable in, among other things, family ties and a sense of common history, heritage, and attachment to the land. Most importantly, no matter what anyone else said or decided, the Mashpee Wampanoag Indian community saw itself as a unique and insular social and political aboriginal group with its own distinct cultural identity. “If the Mashpees possessed a failing in the years before 1970,” Campisi concluded, it was not that they had lost their culture, as Hutchins argued, but rather that they had “so adapted the imposed [colonial] institutions to their own needs and devices that they appeared to the uninitiated” to have assimilated into the American mainstream.<sup>62</sup>

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58. HUTCHINS, *supra* note 37, at 187.

59. Clifford’s article makes clear the many ways in which this point was made by the defense at trial. CLIFFORD, *supra* note 52.

60. HUTCHINS, *supra* note 37. See BRODEUR, *supra* note 3; CAMPISI, *supra* note 5; CLIFFORD, *supra* note 52 (all provide interpretations of Hutchins’ conclusion). Brodeur notes that defense attorney St. Clair used his closing statement to focus on what he considered the two weakest points in the Mashpee’s claim: (1) the question of racial mixture; and (2) the question of political leadership. Interestingly, both of these issues implicated gender in the sense that it was Mashpee women who, at times almost singlehandedly, kept the culture alive through intermarriage (after significant numbers of Mashpee men were lost during the American Revolution) and home arts. Both of St. Clair’s themes during closing argument made light of these ways of keeping culture alive. In fact, Brodeur reports that St. Clair

made light of efforts to assert cultural identity in terms of Indian dishes such as cornmeal dumplings and potato bargain. [St. Clair] concluded by telling the jury that “last minute efforts to create the appearance of a tribe won’t do the trick,” and that the fact that a lot of people in Mashpee are related to one another does not make the place “really different from any other small rural community.”

BRODEUR, *supra* note 3, at 45. St. Clair played on the distinction between “Indian” and “local” as it is drawn in federal law. See St. Clair & Lee, *supra* note 33. See also *supra* notes 11 to 30 and accompanying text.

61. CAMPISI, *supra* note 5.

62. CAMPISI, *supra* note 5, at 150.

Clifford's second observation from watching the *Mashpee* trial was that Indian law precedent subtly enforced a preference for historical testimony based solely on utterances, like that of Hutchins's. So, while the law itself could take in a wide array of professional histories about the Mashpee, it nevertheless preferred those that subordinated autoethnographically derived explanations of identity to ethnographically derived (expert) ones.<sup>63</sup> This preference was rendered even more biased by the rules of evidence, which privileged both documentable histories over undocumented, psychologically oriented ones, and histories that discounted or omitted internal, presumably ephemeral states of cultural consciousness over those that discussed them.<sup>64</sup> In this way, Clifford noted, both the substantive and evidentiary rules governing the *Mashpee* litigation facilitated the explication of less theoretical methodologies over more theoretical ones, and modernist (positivist) explanations over postmodernist ones.

While Hutchins's and Campisi's views about the evidence were fairly similar in terms of the array of possible histories the law could hear, there were important differences with respect to what the law would hear. And though these differences did not go to fundamental issues, like expert qualification or reliability, they were fundamental nonetheless. What Hutchins and Campisi disagreed about was the influence that their respective methodological approaches had on the conclusions they drew from the evidence. For Campisi especially, when the defendants objected to the plaintiff experts' testimony, it was most often on the ground that they were offering facts not supported by data. When the plaintiff tried to explain to the court that because this case involved a colonial process, it raised serious epistemological questions about the definition of the word "fact" and the quality of the extant "data," its concerns were overlooked. The court's refusal to grasp the plaintiff's theoretical concerns meant, in practical terms, that the sort of evidence with which the court felt most comfortable were those documents that came in the wake of a seriously destructive (to the Mashpee) colonial process, documents more likely than not to be tainted by ethnocentric bias.<sup>65</sup>

Clifford's third point was that the outcome of the Mashpee identity claim determined how the Mashpee's claim of right to the land would be described, and even recorded, for the purpose of future histories.<sup>66</sup> If the Mashpee plaintiff was only entitled to invalidate past land transfers on the basis of a 1665 deed, then its rights were circumscribed, currently, by the terms of the deed itself, and, historically, by the Mashpee's status as "plantation Indians,"—a group of indigenous persons clearly governed by colonial (rather

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63. The trial allowed little room either for divergent cultural understandings or Mashpee self-understanding.

The stories that members of the Mashpee Tribe told were stories that legal ears could not hear. Thus the legal requirements of relevance rendered the Indian storytellers mute and the culture they were portraying invisible. The tragedy of power was manifest in the legally mute and invisible culture of those Mashpee Indians who stood before the court trying to prove that they existed.

Torres & Milun, *supra* note 49, at 649. See also Torres & Milun, *supra* note 49, at 654.

64. Torres & Milun, *supra* note 49, at 655.

65. See CAMPISI, *supra* note 5, at 37-41 for his description of the sidebar discussions about bootstrapping.

66. Torres & Milun, *supra* note 49, at 654-56.

than indigenous) authority.<sup>67</sup> The upshot of this basis for entitlement, then, would be that Mashpee identity would be characterized and recorded as similar to that of any other American minority group—the Mashpee would be defined as persons of tribal descent who were nonetheless subject to the state law of Massachusetts. Under this result, it was highly probable that property law's strong policy against forfeiture would defeat the Mashpee claim.

If, on the other hand, the plaintiff was entitled to invalidate past land transfers on the basis of the Nonintercourse Act, then their claim of right lay in their status as an American Indian tribe. This basis for entitlement functioned quite differently than the first. It extended the Mashpee land claim beyond the area described in the 1665 deed to an undefinable, unmeted “territory,” and it based this extension on the historic degree of protection from state law to which the Mashpee, as political minorities, were entitled under federal law. Unfortunately, through this lens the Mashpee claim appeared more daunting than it actually was because it raised the possibility, however unlikely, that individual purchasers (both Indian and non-Indian) who bought without knowledge of potential Indian claims would, via federal law, lose title to land that was clearly theirs under state law.<sup>68</sup> It also appeared to render the presumably most stable of rights under American law—property rights—unpredictable and unstable where Indian claims were concerned. From this politicized perspective, justice under federal law vis-à-vis the Mashpee tribe became equated with injustice under state law toward those who Alan van Gestel described as “innocent and law-abiding [non-Indian] citizens who live under the cloud of these legal [Nonintercourse Act] battles.”<sup>69</sup>

Clifford's observations made a point with which Torres and Milun tacitly agreed. While *Mashpee* was about American Indian tribal identity, it was also about who would gain the right to control future land development in the town of Mashpee. In this sense, Mashpee mirrored, though was not identical to (as the defense argued), processes of change that other small, non-Indian towns had experienced in similar efforts to regulate the erosion of local culture by regional and national forces.<sup>70</sup> But although Torres and

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67. See KAWASHIMA, *supra* note 36, at 21 (offering a specific explanation of the differences between the three distinct groups of indigenous people within Massachusetts colonial society—“tribes,” “plantation Indians” and “individual Indians”).

68. Alan van Gestel, *When Fictions Take Hostage*, in THE INVENTED INDIAN: CULTURAL FICTIONS AND GOVERNMENT POLICIES (James A. Clifton ed., 1990).

69. van Gestel, *supra* note 68, at 292. For a contemporary and popularized version of this argument, see Jerry Ackerman, *The Hazards of Land Titles*, BOSTON GLOBE, Feb. 14, 1993, at A91 (noting that because Cape Cod deeds are notoriously problematic, title insurance is more difficult to purchase, in part, because of the \$700,000 title companies spent to defend against the Wampanoag (Mashpee) Indian claims); cf. MAZER, *supra* note 2 (offering a detailed analysis of how small title holders, though not affected by the Mashpee claim, ended up bearing the brunt of the legal costs in relation to the land developers, whose title was in fact the subject of the Mashpee claim).

70. See, e.g., CAROL J. GREENHOUSE ET AL., LAW AND COMMUNITY IN THREE AMERICAN TOWNS (1994); CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN (1986); David M. Engel, *Law, Time and Community*, 21 L. & SOC'Y REV. 605 (1987) and *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551 (1984); Carol Greenhouse, *Signs of Quality: Individualism and Hierarchy in American Culture*, 19 AM.

Milun were right to say that Mashpee Indian culture was in many ways significantly different from mainstream culture, it was not, at least in this case, irreconcilably so. That is, *Mashpee* was not an either-or case because Mashpee Indian life was not altogether that different from Mashpee non-Indian life. Persons comprising the Mashpee tribe were neither clearly "Indian" nor "non-Indian" insofar as they had adopted American material culture, and, in most daily respects, were much like their neighbors in terms of how they lived and what they owned. For these reasons, Torres and Milun seemed to acknowledge that though Mashpee culture ought to be treated as fundamentally different from mainstream culture as a matter of law, in actuality there was a great deal of overlap between what was considered, on the one hand, traditional Mashpee culture and, on the other, mainstream American culture as represented by the non-Indian exurbanites who had recently moved to town.<sup>71</sup>

In summary, Torres and Milun's suggestion amounted to an argument that approximated the following: The law on tribal identity arguably had an assimilation exception. According to its terms, a tribe could remove itself from the protective realm of the Nonintercourse Act through its own agency, either by voluntarily abandoning its tribal status or by assimilating into the culture at large. This made assimilation the conceptual link between law and society, since the assimilation exception invited litigants to introduce historical, anthropological and sociological evidence about the ways in which their tribal culture was different from American culture at large. However, given the legal system's inherent structural biases, the law, after inviting autoethnographic evidence, was incapable of hearing it. Therefore, it was fairer to presume—as either a doctrinal or a procedural matter—that Native American cultures were irreconcilably different from mainstream American culture, than it was to require that Indian plaintiffs litigate the issue of identity.

The call for a presumption in favor of irreconcilable difference was highly problematic. As noted above, Mashpee "tribespeople" were in many material ways indistinguishable from Mashpee "townspeople," and when they showed up in court claiming difference, they *looked* like "contemporary Americans." Unfortunately, this picture brought with it the weight of a thousand words, ultimately exposing the Mashpee plaintiff to charges like those Hutchins voiced: that the persons calling themselves the Mashpee tribe had reconstructed their Indian identity in line with contemporary pan-Indian principles, not authentic, traditional Mashpee ones, and that they had done so out

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ETHNOLOGIST 39 (1992), and *Courting Difference: Issues of Interpretation and Comparison in the Study of Legal Ideologies*, 22 L. & SOC'Y REV. 687 (1988); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 L. & SOC'Y REV. 409 (1988).

71. As Torres & Milun note:

What the parties fought about was the meaning of 'what happened.' Seen from the perspective of the Mashpee, the facts that defined the Indians as a Tribe also invalidated the transactions divesting them of their lands. From the perspective of the property owners in the Town, however, those same acts proved that the Mashpee no longer existed as a separate people. How, then, is an appropriate perspective to be chosen?

Torres & Milun, *supra* note 49, at 641. See also *supra* note 40.

of greed.<sup>72</sup> It also subjected the Mashpee to the criticism that their decision to sue for return of their aboriginal land was so impractical as to be chaotic. Thus a judgment in favor of the Mashpee Indians, the critics warned, would "overturn almost 200 years of real property law and transactions," thereby forcing the court to serve as a "transitional government," a move that would itself "instigate civil disobedience on a massive scale."<sup>73</sup> For that reason, Alan van Gestel concluded, these groups should be recognized for what he personally presumed them to be: (1) organizations calling themselves Indian, as in the case of the Oneida; (2) bilateral descent groups, as in the case of the Pequot; or (3) just

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72. For variations on this theme, see, e.g., HUTCHINS, *supra* note 37 (Professor Hutchins, a Senior Research Fellow at the Newberry Library in Chicago, testified as a witness for the defense in Mashpee); van Gestel, *supra* note 68 (van Gestel, a partner in the Boston firm of Goodwin, Procter and Hoar, represented title insurance companies in Mashpee); St. Clair & Lee, *supra* note 33 (St. Clair, a partner at the Boston law firm of Hale & Dorr, and Lee, his associate, represented the Town of Mashpee at trial).

73. van Gestel, *supra* note 68, at 293-94.

The characterization of the Nonintercourse Act as an obscure federal statute only recently revived by Indian land claims cases is inaccurate given that the principle of inalienability is central to federal Indian law. The Nonintercourse Act has in fact been the basis for a steady stream of twentieth century cases meant to ensure federal preeminence over states by protecting Indian title. Tim Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979*, 31 ME. L. REV. 5 (1979).

The claim that chaos would follow the cancellation of conveyances of Indian land has been proven unlikely. In Oklahoma, for example, over the course of a 15-month period, the United States filed 301 bills in equity against 16,000 defendants to cancel 30,000 conveyances of Indian allotted lands. *Heckman v. United States*, 224 U.S. 413 (1912) (on behalf of the Cherokee). For other twentieth century cases resting on the Nonintercourse Act or principles of inalienability, see *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941) (on behalf of the Hualpai); *United States v. Minnesota*, 270 U.S. 181 (1926) (on behalf of the Chippewa); *Cramer v. United States*, 261 U.S. 219 (1923) (on behalf of three Indians living separately in Siskiyou County, Cal.); *Winters v. United States*, 207 U.S. 564 (1908) (on behalf of the Gros Ventre and Assiniboine [sic] Tribes of the Fort Belknap Indian Reservation); *United States v. Winans*, 198 U.S. 371 (1905) (on behalf of the Yakima); *United States v. Rickert*, 188 U.S. 432 (1903) (on behalf of the Sioux); *First Nat'l Bank of Decatur v. United States*, 59 F.2d 367 (8th Cir. 1932) (on behalf of the Omaha); *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (on behalf of the Oneidas); *United States v. Abraham*, Civil No. 2256 (E.D. La., filed May 28, 1952) (on behalf of the Chitimachas); *United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943) (on behalf of the St. Regis Mohawks); *United States v. Flournoy Live-Stock & Real Estate Co.*, 71 F. 576 (C.C.D. Neb. 1896) (on behalf of the Omaha and Winnebago); *United States v. Flournoy Live-Stock & Real Estate Co.*, 69 F. 886 (C.C.D. Neb. 1895) (on behalf of the Omaha and Winnebago). See also *GETCHES ET AL.*, *supra* note 30, for a discussion of Indian land claims in the context of the Pueblo Lands Act, 43 Stat. 636 (1924).

Finally, in 1978 the American Land Title Association (ALTA) published a memorandum arguing (1) that Congress had the power and the duty to extinguish the eastern land claims cases; (2) that Congress could do so without fear of Fifth Amendment liability under *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); and (3) Congress could also extinguish land claims cases founded on treaty rights by compensating tribes, via the Court of Claims process, for the market value of the lands at the date of the challenged transaction plus 5% simple interest per year to date. AMERICAN LAND TITLE ASSOCIATION, INDIAN CLAIMS UNDER THE NONINTERCOURSE ACT: THE CONSTITUTIONAL BASIS AND NEED FOR A LEGISLATIVE SOLUTION (1978).

a local community of mixed racial heritage, as in the case of Mashpee, but in any case, not Indian nations.<sup>74</sup>

In *Making All the Difference*, Martha Minow took a different theoretical approach in an effort to support the Mashpee claim for tribal status. While Torres and Milun argued that Native American cultures were irreconcilably different from the mainstream, Minow argued against forcing cases like *Mashpee* into rigid “either-or” frameworks.<sup>75</sup> According to Minow, the *Mashpee* plaintiff lost because of the court’s strong adherence to the oppositional categories of tribe/non-tribe, an adherence that was reflected by the judge’s insistence on getting a straight “yes” or “no” answer from the jury on the issue of tribal status. Ironically, Torres and Milun’s approach, at least under Minow’s analysis, seemed problematic for the same reason: Their approach promoted an “either-or” analysis by forcing a distinction, even if only theoretically, between Native American culture and mainstream American culture.

To be fair, in discussing *Mashpee*, Minow was not concerned with finding a solution as specific as a presumption in favor of tribal status, as Torres and Milun apparently had been. Still, despite their point of disagreement, Torres, Milun, and Minow all took the position that the legal process unjustly discounted the Mashpee plaintiff’s perception of itself as a tribe, a perception that should have counted in the assessment of legal difference. One good way to count it, Minow wrote, was first to initiate the breakdown of the idea that a tribe and a non-tribe were mutually exclusive legal entities, and then to set aside definitional questions so as to make possible a direct inquiry into the “real” issue: whether the plaintiff, given its history, ought to receive protection from land sales under federal law.<sup>76</sup> This line of inquiry, Minow argued, would have countered the defendants’ effort to persuade the court that the *Mashpee* dispute was ultimately about competing visions of the town’s future, rather than about the violation of federally protected American Indian rights.<sup>77</sup> In subordinating the question of land use to the more abstract question of rights, Minow’s argument rested itself on one of the most fundamentally ethnocentric and increasingly problematic assumptions of American

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74. van Gestel, *supra* note 68, at 301-02. See also John M.R. Paterson & David Roseman, *A Reexamination of Passamaquoddy v. Morton*, 31 ME. L. REV. 115 (1979). Paterson & Roseman are Attorneys General for the State of Maine who, to avoid conceding the issue of tribal identity, prefaced their article in this peculiar way:

The two Indian groups are commonly known as the Passamaquoddy Tribe and the Penobscot Nation. While the article may hereafter use the terms “Passamaquoddy Tribe” and “Penobscot Nation,” the use of the titles “Tribe” or “Nation” does not necessarily indicate that the authors believe those Indian groups constitute tribes in a legal sense. The legal status of the Maine Indians could presumably be an issue in any future litigation, as it was in *Mashpee Tribe v. New Seabury Corp.* . . . . However, because the Passamaquoddy and Penobscot are usually referred to as “Tribe” and “Nation,” respectively, and for ease of reference, we have employed that nomenclature in this article.

*Id.* at 115 n.2.

75. MINOW, *supra* note 34, at 351-56.

76. Ironically, it was federal law that required the splitting of these two issues. See *supra* notes 13-14, 22, 27-30 and accompanying text.

77. MINOW, *supra* note 34, at 355-56.

property law: the assumption that land use—the physical use of land (space)—is an acultural activity, and thus a phenomenon completely separable from culture (identity).

To close, both Torres, Milun, with their procedural suggestion for defending tribal rights, and Minow, with her rights-based one, illustrate what makes the *Mashpee* case so central. On one hand, a tribe is a distinct entity. Based on that distinctness, the federal government decides whether or not to offer its (high-priced) protection under acts like the Nonintercourse Act to groups like the *Mashpee*. Yet on the other hand, a tribe is very much part of the community at large, an observation especially true for eastern tribes. In *Mashpee* there was no distinct, impermeable boundary between the tribe and the town, at least as far as culture was concerned, though there were rigid class boundaries. And yet both sides (not just the defendants, as Minow asserts) held a vision for the town's future. These visions were in sharp competition, and, more importantly, they were culturally constructed. From this relational set of competing views, the distinct *Mashpee* vision emerged, unexpressed and unarticulated until well after the final stages of litigation.<sup>78</sup> Here, too, what was distinctly "Indian" (or tribal) about *Mashpee* life came into focus, not as an essential trait, but as a political and economic commitment to a specific way of using a specific set of resources. The next section explores the details of this claim.

### III. DIFFERENT AND THE SAME: THE SHORE AS A METAPHOR FOR THE FUTURE (LAND USE) AND THE PAST (IDENTITY)

Most Native American land litigation has involved federally recognized Indian tribes on western reservations; therefore proving "Indian-ness," except in eastern land cases or the Pueblo cases cited above, has been a relatively straightforward process. Typically, it involved contradicting stereotypical beliefs by paradoxically locating them in the positive or incomprehensible (to the outsider) aspects of one's "culture." So, for example, if the colonial stereotype of Indian cultures was that they lived in mythical time, then testimony was often constructed to address, acknowledge or even mimic this belief.<sup>79</sup> Proof of this sort inextricably linked Indian descriptions of identity, both ethnographic and autoethnographic, with generally held stereotypes of the same. Thus, for a tribal community to secure its right to federal protection via the legal process, it had to present itself in a way that made it recognizable to non-Indians.<sup>80</sup> But as Torres and Milun noted, despite the admissibility of autoethnographic evidence, the legal system still preferred professionally prepared ethnographic evidence.<sup>81</sup>

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78. CAMPISI, *supra* note 5, argues that there were aspects of *Mashpee* "Indian-ness" that were in fact so much a part of *Mashpee* culture as to be unarticulable until they were negotiated at trial. This makes sense if one keeps in mind that the *Mashpee* led an isolated existence at least until the construction of the freeway in the 1950s, which linked Cape Cod with Boston. Hence, before the conflict that led up to the lawsuit, the *Mashpee* had not had to define themselves in opposition to non-Indian groups in any essentialist way. *See also* Minow, *supra* note 49.

79. Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213 (1979).

80. This is not a new insight. *See, e.g.*, Alfred Kroeber, *Nature of the Landholding Group*, 2 ETHNOHISTORY 303 (1955) for one of the first articulations of this reality of Indian litigation.

81. Torres & Milun, *supra* note 49, at 631-32.

In a chapter on anthropological method, E. Adamson Hoebel explained the reason for this bias. In the sweepingly general tone of his time, he noted that some cultures thought in terms of formal patterns and ideal norms while others did not. To support this assertion he quoted the work of another anthropologist, Ralph Linton, who wrote that during his fieldwork when he had asked subjects what was proper behavior for a particular situation, "Polynesians [would] give you practically an Emily Post statement of what proper behavior should be on all occasions, whereas Comanches . . . [would] immediately answer, 'it depends.'"<sup>82</sup> According to Linton, while the Comanche informant *thought* of human behavior as a range of unlimited, individual choices, he or she *acted* as if there was only a narrow, predictable range of proper behavior for any given situation. Based partly on Linton's work, Hoebel concluded that, in addition to other problems with studying Native American law-ways, for "most North American Indian tribes there is little gain [for the ethnographer] in spending more than the briefest time in search for verbalized ideal norms."<sup>83</sup>

For Hoebel, the law responded to the ethnographic subject's reluctance to articulate ideal norms and principles with a systemic bias against autoethnographic evidence, which was designed to meet systemic needs.<sup>84</sup> The legal system needed reliability and verifiability, both of which could be ensured by uniformity in professional method. But autoethnographic presentations caused concern and always would, Hoebel argued, because a court (or an anthropologist) could never be certain just how seriously the witness (or informant) held the methodological values that were central to the professional's craft.<sup>85</sup> Even when autoethnographic evidence was "most sincerely offered," Hoebel concluded, problems of validation were "never absent."<sup>86</sup>

Returning to the issue of assimilation in American Indian identity cases, then, ethnographic evidence of assimilation in a case like *Mashpee* could nonetheless be treated

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82. HOEBEL, *supra* note 19, at 40 (citing Ralph Linton, Comment on the paper by L. Hanks, Jr., *The Locus of Individual Differences in Certain Primitive Cultures*, in *CULTURE AND PERSONALITY* (Stansfeld Sargent & Marian W. Smith eds., 1949)).

83. HOEBEL, *supra* note 19, at 40.

84. Cf. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660 (1990) (pointing to indigenous peoples' insistence on the right to define themselves as superior to any systemic needs such as, for example, the ones that Hoebel noted).

85. Hoebel wrote:

Determination of the validity of the recorded cases poses problems that are not always amenable to easy solution . . .

This problem, of course, obtrudes itself in every courtroom, and the potential unreliability of even the most sincerely offered evidence is axiomatic in legal psychology. In ethnological field work the difficulties are decreased in situations in which the ethnologist is an on-the-spot observer. They are increased along with the danger of distortion when the ethnologist is working with reconstructions of events long past. In either event they are never absent.

HOEBEL, *supra* note 19, at 42.

See also Hoebel's description of "the significance of this aspect of validation" in his description of Stump Horn and Calf Woman's accounts. HOEBEL, *supra* note 19, at 44-45.

86. HOEBEL, *supra* note 19, at 42.

as consistent with evidence of anti-Mashpee (Indian) bias, especially if one factored in time. In other words, before assimilation, the conflict in Mashpee might accurately have been characterized as an ethnic one, with anti-local bias appearing as the crust of a deeper anti-Indian sentiment. But after assimilation, a conflict like the one in Mashpee was best theoretically characterized primarily, if not solely, as a struggle between local and regional actors over limited resources. Non-Indian communities could be regarded as separate and isolated from the American mainstream, as were Indian communities, yet “non-Indian backward-ness” was importantly different from “Indian backward-ness” because it implicated an entirely different set of images that suggested entirely different solutions to the real question of who would control the land, and under what claim of right.<sup>87</sup> “Non-indian backward-ness” implicated imagery of differences between the local and the cosmopolitan, but differences that were resolvable by courts, predictable rules, and sanctions. “Indian backward-ness,” on the other hand, implicated imagery of irreconcilable cultural differences between Westerners and non-Westerners.<sup>88</sup> These differences were not necessarily resolvable because of the stereotype that Indians, though answerable in American courts, brought land suits out of lawlessness and a general disrespect for (or lack of familiarity with) the order of private property.

In other words, when Indian communities were called to explain their culture and beliefs, a pragmatic politics of memory necessarily shaped the terms of the legal discussion. These politics were pragmatic in the sense that litigants recognized how claims for Indian status had to reflect stereotype in order to be considered authentic.<sup>89</sup> It was also legal, though not explicitly so until *Mashpee*, in the sense that it recognized that the legal system treated ethnographic accounts as more reliable than autoethnographic ones, and, therefore, gave more weight to what others said about the Mashpee than to what the Mashpee said about themselves.<sup>90</sup> In *Mashpee*, both the plaintiff and defendants understood these politics. For that reason fourteen of the plaintiff’s thirty-four witnesses, and twelve of the defendants’ nineteen witnesses, identified as “persons of Mashpee descent” were called to testify about everyday life in Mashpee.<sup>91</sup> Their accounts were presented in an almost nameless, timeless way, with the witnesses serving more as real proof (did he or she *look* “Indian”?) than as anything else. Not surprisingly, what witnesses remembered or could not remember paralleled stereotypical perceptions of “Indian-ness”: when a witness’s memory (or looks) deviated from the standard

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87. See *supra* text accompanying notes 57-62.

88. See James Clifford, *On Orientalism*, in *PREDICAMENT*, *supra* note 52, at 255 (exploring the functions of a dichotomizing concept like “Western,” and its opposite “non-Western”). See also *supra* text accompanying note 21; CAMPISI, *supra* note 5, at 9-58; Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

89. For a useful collection of articles on this point, see *REMAPPING MEMORY: THE POLITICS OF TIME/SPACE* (Jonathan Boyarin ed., 1994).

90. See *supra* notes 60-61 and accompanying text.

91. See MAZER, *supra* note 2, at 422-24 for a complete list of trial witnesses for plaintiff and defendants.

stereotypical picture (accurate or not), that witness's cultural authenticity and integrity were called into question.<sup>92</sup>

Thus *Mashpee* represented the culmination of the federal acknowledgment cases that had been decided in the courts. It illustrated how a hierarchy of evidentiary authority had emerged in identity cases, during the over one-hundred-year period before the BIA instituted the Federal Acknowledgment Project.<sup>93</sup> By the terms of this hierarchy, the best way to determine whether a community was indigenous was to look to the federal system of treaties, statutes and executive orders.<sup>94</sup> If such documents existed, then the group constituted an Indian tribe. If not, then a deeper social inquiry was necessary to determine the group's status. In this way, then, each tribal recognition case was a microreflection of the pattern of Indian law and scholarship overall. Each case reflected a tension between the particular and the abstract, with litigants often presenting particular facts about identity only to serve as illustrations for the professionals' abstract definitions of "Indian-ness." This tension was apparent in *Mashpee*. No matter how the litigants tried to define their own cultural identity, as they knew it, the force of stereotype intruded: If they called themselves Indian, then they had to prove themselves radically different from their neighbors; but if they characterized themselves as locals, then they were presumed to have assimilated. In either case, whatever it was that might be called "Mashpee" was buried, and the law, no matter how well-meaning, could not help uncover it.

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92. James Clifford's article is the best source and illustration for how this phenomenon worked. See CLIFFORD, *supra* note 52. BRODEUR, *supra* note 3, also gives a good account of the defense's manipulation of belief on this issue at trial.

93. See Quinn, *supra* note 17, at 40-45 for a brief history of the Federal Acknowledgment Project which was instituted in 1978. Today the Project is part of the Branch of Acknowledgment and Research. The Branch has received 165 petitions (40 petitions that were on file when the Acknowledgment staff organized in October 1978, and 125 new petitions received since October 1978). Of the 165 petitions, the Branch has resolved 25, while Congress has resolved seven. Of the 25 petitions resolved by the Branch, nine tribes have been acknowledged, 13 have been denied, and the other three have been clarified by other means. Of the seven resolved by Congress, one tribe was restored and six of the petitioning tribes acquired federal recognition. SUMMARY, *supra* note 7.

The Branch is developing what is regarded as technical expertise in the area, thus making obsolete Judge Skinner's observation that determining tribal status is not a technical matter for experts, but rather part of the human condition that is within the purview of the jury. See also Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991) (describing the background of federal recognition in the executive branch); COHEN, *supra* note 13 at 270-72 (setting out Cohen's criteria for determining the eligibility of tribes; these criteria are a hierarchical list of evidence that the Executive ought to consider when determining tribal status); see also *Recognition of Certain Indian Tribes: Hearing on S. 2375 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. (1978).

94. The Kansas Indians, 72 U.S. (5 Wall.) 737, 756-57 (1866) (the courts will accord substantial weight to federal recognition of a tribe).

The Mashpee Tribe had been recognized as an Indian tribe by the state of Massachusetts under Executive Order 126, which was signed by then Governor Michael Dukakis. This recognition was dismissed by the federal court as being the result of a political rather than a cultural acknowledgement process; hence it carried no evidentiary weight at trial.

The *Mashpee* found it particularly difficult to convey that their lawsuit was not solely motivated by a need to elevate discussions of American Indian recognition to rights-talk, as Minow suggested. Nor was it solely about competing visions of land use. It was about both, if one considered that the litigation centered around physical, geographical spaces that the Mashpee, in their sense and custom as American Indians, regarded as common, not private, resources: the shore, the beach, fishing areas and other waterfront areas.<sup>95</sup> Over the years the Mashpee had treated these same areas as inalienable even though the land abutting them had been sold. But while the defendants regarded this behavior as evidence that the Mashpee plaintiff was motivated by greed (on the theory that if the Mashpee had assimilated enough to sell their land, they ought to be barred either from getting it back or being compensated for it under the Nonintercourse Act), the Mashpee plaintiff saw it as life-as-usual in a locality where most landowners had been absentee summer residents.

That is, what was different and irreconcilable about Mashpee culture in relation to the mainstream American culture was the way in which the Mashpee saw the waterfront areas. The Mashpee vision for these areas was that they remain open for common use, regardless of title formalities. This was a vision that individual tribemembers could hold independently of their opinions about whether the tribe ought to retrieve title under the Nonintercourse Act. And tribal members' views about the Nonintercourse Act were ones that they could hold independently of their ideas about identity. That these views were independent and yet related explains, in part, how the defendants managed to persuade tribal members to testify on their behalf.<sup>96</sup>

The exurbanite vision for the contested physical sites, on the other hand, was based on exclusive use stemming from individual property rights. This vision could also be held regardless of dissention in the non-Mashpee community over the litigation. That is, a non-tribal member could support the Mashpee claim for federal recognition and yet still promote the idea that waterfront areas ought to be treated as property whose use was exclusive to the title holder. And in fact, there was a small but vocal minority of non-Indian Mashpee citizens, calling themselves the Mashpee Coalition for Negotiation, who strongly supported a negotiated settlement between the tribe and the town as a way of resolving the Nonintercourse Act litigation.<sup>97</sup> This liberal coalition shared the plaintiff's concern about the suburbanization and overdevelopment of Mashpee, though its concern did not extend to visions about how the waterfront areas ought to be used. Over time, in the non-Indian part of town, the liberal pro-negotiation position came to be linked with an anti-development position, which itself became equated with what was considered the radical pro-Indian position.

Hence, over the course of the *Mashpee* litigation both the issue of who owned the land (a legal question) and how the land ought to be developed (a political question) were reduced to the question of whether the Mashpee were a tribe (a cultural question) in a

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95. CAMPISI, *supra* note 5, at 157 (detailing the shell fishing litigation and the way that the Mashpee reverence for these common areas eventually did get articulated).

96. See MAZER, *supra* note 2 (tracing the factions within the tribe in the town of Mashpee in such a way that corresponds with the idea that views of land use, Nonintercourse Act applicability, and tribal identity could be independent of each other).

97. MAZER, *supra* note 2, at 248-57.

process that Minow likened to “the Sesame Street game of ‘Which one of these things is not like the others?’”<sup>98</sup> Ultimately, this is how the *Mashpee* judges and commentators fell into the trap of reaching yet another complacently pragmatic solution in the area of Indian law.<sup>99</sup> Because the tribe appeared to want the impossible (forfeiture of land), their solution seemed impractical; and because the exurbanites wanted the usual (exclusive use of private property), their solution seemed common sensical.<sup>100</sup> Under this sort of scrutiny, then, it “made sense” to dismiss the Mashpee tribe’s claim unless there was a compelling showing of difference.<sup>101</sup> Ironically, this modern line of thought came dangerously close to the blatantly evolutionary and racist custom (superstition) or law (reason) dichotomy followed in the *Joseph* and *Montoya* line of cases. “Indian-ness” became linked to impracticality and “non-Indian-ness” to common sense.

The Mashpee sought an “impractical” remedy under state property law. But was their vision for the waterfront as a commons so unprecedented in American law? Was private ownership of land coupled with something akin to an easement for public use so unusual under American property law as to be an incomprehensible solution?<sup>102</sup> The answer, of course, is no. The next section of this Article sets out details with which the Mashpee vision could have been rendered more understandable and familiar at trial.<sup>103</sup> Following a law and society approach, it distinguishes and separates the Mashpee vision of the shoreline areas from aspects of landownership and local political control. This move is analytically important, especially in light of the fact that the Mashpee lost title to the shoreline areas long before they lost control of them, and they lost control long before they lost access.

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98. MINOW, *supra* note 34, at 356.

99. Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990). Cf. Minow, *supra* note 49, at 97-98.

100. See *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990), with specific attention to Singer, *supra* note 99 (analyzing how complacent pragmatism relies on ideas of “common sense” to make situated judgments, and how appeals to common sense are hidden appeals to the myth that there is a consensus on fundamental values, especially with respect to such institutions as property).

101. Judge Skinner noted as much when he pointed out that given the extraordinary remedy the tribe was seeking, they would have to prove to him that something significant in fact set them apart from the American mainstream. *Mashpee Tribe v. Town of Mashpee*, 427 F. Supp. 899, 902 (D. Mass. 1977). See *supra* note 48.

102. See, e.g., *Zuni v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990) and *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), two cases involving public easement rights over private land.

103. For an analysis of the importance of familiarity as a decolonization technique, see Abdul R. JanMohamed, *The Economy of Manichean Allegory: The Function of Racial Difference in Colonialist Literature*, 12 CRITICAL INQUIRY 59 (1985).

IV. IDENTITY AS IDIOM: THE SHORE AS A COMMONS<sup>104</sup>

In 1869, the General Court of Massachusetts removed all restrictions on the sale of Mashpee land to outsiders; the next year, Mashpee was incorporated as a town. In 1871, Mashpee Indian residents still held most of the acreage in Mashpee.<sup>105</sup> By 1900, however, land in Mashpee was owned primarily by absentee non-Indian owners. That year there was a total of about 4009 acres of Mashpee land in residents' hands and 8302 acres in non-residents' hands, with 117 Mashpee residents owning over 20 acres or more of land, and 180 non-residents owning the same. By 1910, 106 Mashpee residents owned 20 acres or more as opposed to 224 non-residents; in 1920, only 83 residents owned 20 acres or more as opposed to 637 non-residents; and by 1930, while 100 residents owned 20 acres or more of land, 659 non-residents had acquired title in fee simple absolute, each to 20 acres or more of Mashpee land. Tax valuation records for the year 1930 showed that non-residents owned about 11,787 acres of the 14,200 acres assessed in Mashpee.<sup>106</sup>

The one non-resident owning over 200 acres of land in 1871 was Timothy Pocknett; he owned 360 acres.<sup>107</sup> Pocknett, though not a Mashpee, was married to a Mashpee woman. By 1890, Harvard's George Lowell (through his estate) was the largest non-resident owner in Mashpee, with about 441 acres. And by 1900, only a single Mashpee native, Walter Mingo, continued to own over 200 acres of Mashpee land. Tax valuation books showed that none of the five non-resident owners that year were related to Mashpee Indians by marriage. Those books also show that over the course of the next eighty years, there would be a slow transfer of land, first, from Mashpee hands to the hands of those who were neither tribal members nor the spouses of tribal members, and, second, from private hands to corporate ones. Thus, by 1950 the Popponesset Beach Company was reportedly the largest non-resident land owner in Mashpee. In 1960 the Henry C. Labute, JP Trust gained the distinction. In 1970, the New Seabury Corporation, which was the principal defendant in *Mashpee*, entered the picture with 288 acres. By the end of the *Mashpee* litigation, in 1979, the New Seabury Corporation had acquired about 1161 acres of land, making it far and away the largest record land owner in Mashpee. So, even though the newly incorporated Mashpee Tribe owned 55 acres of land in 1979, there were no individual Mashpee Indian landowners with 200 acres or more; and, in fact, there had been none since the 1920s.

Over the years, voter registration records showed yet another way in which the Mashpee were losing control of the town.<sup>108</sup> From 1870 to the 1960s, although land was

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104. The following discussion draws heavily from MAZER, *supra* note 2. Mazer's work, which is a Ph.D. dissertation, collects the documents analyzed below. Mazer's study of *Mashpee* is by far the most complete of the extant literature. Both CAMPISI, *supra* note 5, and HUTCHINS, *supra* note 37 describe these aspects of Mashpee history throughout their accounts. This view of Mashpee is also present, though in very general form, in the Mashpee's BIA Petition for Acknowledgement (on file with author).

105. Mashpee residents (the majority of whom were no doubt Indian) owned 8520 acres; non-residents 928 acres. MAZER, *supra* note 2, app. 1 at 393, Resident/Non-Resident Landowners of More than 20 Acres. See also app. 4 at 410, Individuals Owning Over 200 Acres of Land, 1871-1979.

106. MAZER, *supra* note 2, app. 1 at 393.

107. MAZER, *supra* note 2, app. 4 at 410.

108. MAZER, *supra* note 2, app. 5 at 413, Voter Registration in Mashpee, 1940-1979.

passing into non-Mashpee hands, the tribe retained control of the town via local government structures.<sup>109</sup> In the 1940s there were 152 registered voters in Mashpee. By 1960, 510 people called Mashpee their principal place of residence, and so registered to vote there. From 1960 to 1970, voter registration increased dramatically<sup>110</sup> so that when the New Seabury Corporation first appeared on the tax valuation records in 1970, there were 856 registered voters in Mashpee. The year 1976 showed a jump to 1978 voters; 1977, 2412; and 1979, 2562 registered voters in the town of Mashpee with no significant increase in the Mashpee Indian population over that same period of time.<sup>111</sup>

The new voters were distinguishable from the Mashpee Indian voters, although not necessarily irreconcilably so, in several important respects. First, they were considerably more affluent. In 1970 Mashpee was reportedly the one town on Cape Cod that had the highest percentage of owner-occupied housing units valued at both over \$50,000 and under \$10,000.<sup>112</sup> This class distinction eventually effected the split between the town and the tribe as more of the affluent, non-Indian voters became permanent residents of one of the four New Seabury developments. Over time, the Mashpee plaintiff formed the opinion that these affluent voters were the ones who had succeeded in wresting local political control from the tribe. They based their opinion on the following information.

In the 1950s, Otis Air Force Base opened, with many military families living off-base, and although these families increased the demand for housing, they were not heavily involved in organized local politics.<sup>113</sup> Popponesset also began growing at this time. Popponesset was a working class, Catholic subdivision that had once tried to secede from the town of Mashpee because of its dissatisfaction with the town (tribal) services; despite the Popponesset residents' dissatisfaction, however, they had not managed to wrestle political control from the tribe in twenty years of growth.<sup>114</sup> In 1979, housing prices in Popponesset remained in the modest \$35,000 to \$90,000 price range, with houses closer to the waterfront in the high end of the range.<sup>115</sup> Thus, the Popponesset residents, though perhaps at odds with the Mashpee tribe, had reached a point of political stasis with it.

In the early 1960s, however, New Seabury started its development, with four subdivisions for the exurban affluent.<sup>116</sup> The Village of Highwood was designed for horseback riding; Bright Coves and Summer Seas for boating and water sports; and

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109. MAZER, *supra* note 2, app. 2 at 394, Lists of Town Selectman, 1870-1979, and app. 3 at 395-409, Town Political Officers, 1870-1979.

110. MAZER, *supra* note 2, at 111, 137. Mazer quantifies increases in voter registration from 1930 to 1970 at 341%. *See also* MAZER, *supra* note 2, app. 5 at 413.

111. MAZER, *supra* note 2, at 137. *See also* MAZER, *supra* note 2, at 132 for discussion of the town's growing population; MAZER, *supra* note 2, app. 5 at 413.

112. MAZER, *supra* note 2, at 135. So divided was the town in this respect that the term "Mashpee" was used to refer to the native (Indian) section of town, which marked the \$10,000 and below point, and "New Seabury" to the non-native area of town, which marked the \$50,000 and above point., MAZER, *supra* note 2, at 134-36.

113. MAZER, *supra* note 2, at 105.

114. MAZER, *supra* note 2, at 105.

115. MAZER, *supra* note 2, at 112.

116. *See* MAZER, *supra* note 2, at 106 for a related analysis of the changes in the average number of building permits during this time.

Greensward East for golfing.<sup>117</sup> With this development came other significant developments, like the construction of the New Seabury Shopping Center, whose existence over time shifted the center of town from the Indian area, which was "poor," to the New Seabury area, which was "affluent."<sup>118</sup> In 1979, housing prices in the New Seabury developments ranged from \$55,000 to \$250,000, again with waterfront units falling in the high end. Eventually, New Seabury succeeded in its effort to develop Mashpee, and over time Mashpee Indians, who had once been enthusiastic about the developments, found themselves upset for being cut off from the shoreline and its resources.<sup>119</sup>

The new voters of Mashpee, who were neither Mashpee Indians nor married to Mashpee Indians, were significantly more affluent than Mashpee Indians, as represented by housing prices. They were also willing to build on and exclude others from the waterfront areas, unlike the Mashpee who had treated these areas as a common resource.<sup>120</sup> Moreover, New Seabury residents had a political ambition that the Popponesset residents apparently lacked, because not only were New Seabury residents registering to vote in Mashpee, they were participating in and gaining control of the local political process. Together these factors changed, first, the ethnic balance of power in local politics, and, second, the physical layout of the land. With the wealthiest non-Indians clustered around the waterfront areas, the recent, affluent, non-Indian arrivals in Mashpee were quick to push for a new regime of local concerns, one that benefitted the less affluent, non-Indian residents of Popponesset as well.<sup>121</sup> This new regime came at the expense of the Mashpee tribespeople who, unlike their more affluent neighbors, lived inland, but travelled to the shore to engage in subsistence fishing activities.<sup>122</sup> Over time, class differences between the non-Indians receded into the background while ethnic differences between whites and Indians came to the fore.<sup>123</sup>

The new coalition of "white" voters wanted local government to protect their property from trespassers, and to assure that residents would have freedom to develop their land as they saw fit. They also wanted increased town services. Freedom to develop and protection from trespassers (exclusive use), in the fray of the conflict overall, constituted a call to cut off Mashpee tribespeople from access to the waterfront areas. Hence the new regime was an implicit (and successful) effort to further divide the town along ethnic lines by defining the Mashpee tribespeople as the very same trespassers from whom local government was supposed to protect "legitimate" and "bona fide" Mashpee landowners.<sup>124</sup>

The new local regime was also an implicit (and successful) commencement of a development process that would eventually shift the center of town to the New Seabury

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117. MAZER, *supra* note 2, at 107.

118. MAZER, *supra* note 2, at 108-11, 134-36 (describing how initially New Seabury's development was welcomed by the tribe). See also CAMPISI, *supra* note 5, at 139 (citing HUTCHINS, *supra* note 37, at 160-61).

119. MAZER, *supra* note 2, at 108-16.

120. MAZER, *supra* note 2, at 116 (noting that public access to the bay in South Mashpee's lakes and rivers declined as development increased).

121. MAZER, *supra* note 2, at 218-71.

122. MAZER, *supra* note 2, at 116.

123. See MAZER, *supra* note 2, at 229-48, 313-64.

124. MAZER, *supra* note 2, at 229-48, 313-64.

area, since these areas, given their relatively greater affluence, consumed significantly more in the way of town services.<sup>125</sup> So, for example, over the years, the fire department would move south, as would the post office and the main freeway exit. In this way, the Mashpee tribespeople became “outsiders” in their own land through shifting machinations of local power, an assignation that was in many ways independent of whether they would or would not be labeled outsiders (“an Indian tribe”) under federal law. And in fact, as discussed in previous sections, even though the incoming voters of Mashpee took the position (via the statements of their selectmen) that the Mashpee tribespeople were “outsiders” in relation to the local political process, they adamantly maintained the position that the Mashpee were “insiders” under American law—by virtue of having assimilated into mainstream American society—and thus ought to be subject to state property law rather than to federal Indian law.

Here, then, is one point of cultural irreconcilability that emerges from the record, rather than from stereotypes of who the Mashpees were or should have been as “Indians.” Though the Mashpee Indians believed in and practiced the dictates of private property, they viewed various waterfront areas as a common resource. In this respect they were indeed irreconcilably different from their affluent neighbors who regarded the shore as highly marketable (and hence exclusive) private property. So integral a part of Mashpee culture was this view of the commons, that in the years during which the tribe controlled the town of Mashpee without holding title to most of its land, this notion had not been articulated, either as ideal or concern.

Campisi testified that the failure to articulate this norm of the waterfront as commons resulted because shared use of the waterfront areas was in fact so fundamental a part of Mashpee life that it had not been questioned until the influx of newcomers; hence it had not been articulated, only acted upon.<sup>126</sup> The right to use the waterfront areas as a commons, regardless of who owned the adjacent land, was not consciously expressed as a “right” in Mashpee culture—it was simply assumed. But when the process whereby the Mashpee tribespeople lost local political control rendered them outsiders to power, what was only background became visible. At this point, key symbols of identity, and ultimately of access to power (like the symbolic word “tribe”), became so charged that their meaning was adjudicated. Meanwhile, the system of non-Indian dominance, a system that opposed custom to law, superstition to reason, impracticality to common sense, and Indian to American was left not only unquestioned, but more deeply entrenched than before, both at the federal and the local levels.<sup>127</sup> Ironically, it was not until the legal process reached its end that the Mashpee came to articulate their ideal of

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125. MAZER, *supra* note 2, at 134, 137, 142 (discussing the physical separation between the Mashpee and the New Seabury communities; the changes in voter registration laws, dates of annual town meetings, and location of meeting elections; and the passage of a 1971 referendum allowing public funds to be used to remove snow from “private roads,” all of which were in the affluent New Seabury area of town).

126. See CAMPISI, *supra* note 5. See also text accompanying *supra* note 82.

127. See Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989).

the shore as a common, inalienable resource, and in some ways, regrettably, to even reconfigure this idea into stereotype.<sup>128</sup>

### CONCLUSION

The Mashpee Wampanoag Tribe turned to federal law to validate what it regarded as its superior rights to its ancestral land. What the Mashpee Tribe discovered was that federal law served as both resource and constraint; that is, the law that was applied to resolve the dispute ended up escalating it instead by virtue of the way in which it skated on the surface of stereotype after stereotype. The law presumed Indian ways to be primitive, chaotic, timeless, simple; more troubling, it assumed that any tribal adaptation to colonial society was in fact an assimilative embrace of the mainstream. Even as late as 1977, lawyers who prided themselves on defending “innocent” land purchasers from the Nonintercourse Act claims of “greedy” Indians interpreted this body of law to allow for the unwitting and unconscious assimilation of Indian tribes into the American mainstream. According to this view, if tribespeople conformed to the broader culture, they were said to be choosing to assimilate, even if only constructively so. This presumption, the lawyers argued, was rebuttable, but *only if* the tribe could prove that it had been coerced by the broader society into abandoning the “old” and embracing the “new.”

The commentary that surfaced to explain and counter what happened in *Mashpee*, though sympathetic to the Mashpee Tribe’s position, based itself on similarly general discussions about whether the Mashpee were or were not culturally different from the mainstream. But while the commentary noted that identity is negotiated and dependent on circumstance, it nevertheless conceptualized identity as something separate and apart from social life. Hence this commentary ignored a significant body of local evidence about land use patterns in Mashpee in favor of wrestling with time-weary stereotypes about Indians generally.

The implication of the local data that rested directly beneath the surface of these various layers and articulations of stereotype linked the Mashpee Wampanoag Indians to other Indian nations across the country. In other words, while the Mashpee may have had a unique and on-the-surface “non-Indian” history, the way in which they lost control of their land linked them to other tribes who have also been forced to contend with the flow

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128. See, e.g., CAMPISI, *supra* note 5, at 142-44 (describing speeches given in Mashpee around the time of the litigation).

In Mashpee, the Wampanoag tribe wails for their weakened home. Struggling to maintain the Earth’s tender and tenuous balance, they hunt deer that dart across the landscape and bait lines to hook fat silvery fish. They harbor an unquestioning reverence for the land, for the trampled grasses, the ugly concrete and the towering trees with wind-rippled leaves just beginning to teeter toward gold.

Smith, *supra* note 9, at 33. Thus began the obituary for Lewis Gurwitz, who defended four members of the Mashpee tribe after they were arrested for taking shellfish without a permit and for exceeding the limits set by the state. Gurwitz argued that the Mashpee had an aboriginal right to take shellfish. The assistant district attorney countered that the Mashpee had no such right because they “are not a tribe, they are individuals who are assimilated into American society and culture.” CAMPISI, *supra* note 5, at 157, citing CAPE COD TIMES, Sept. 15, 1984.

of a new, late-twentieth century wave of “settlers.” These settlers moved to Indian Country and found themselves subject to tribal jurisdiction; this in turn fueled their bitter resentment about the fact that Indian nations have a legitimate governmental interest in those areas. In Indian Country, this particular kind of disappointment has given rise to rhetoric that Indian governments, because they represent “irreconcilably different” cultures, do not know how to use land in ways that maintain or increase property values, and that Indian people, because they have treaty rights, lead lives of luxury bankrolled by the federal government. These sorts of mutterings carried persuasive weight in *Mashpee*, even though it was the Mashpee Wampanoag Indians’ use of the shore as an common area that helped maintain its undeveloped and wild quality, a quality that contributed to making the lots along the shore some of the highest-priced real estate in Mashpee. But despite this irony, the non-Indians in Mashpee complained that their property rights ought to trump any rights that the Indians might have, and that it would be an injustice for federal law to validate Indian rights over what they considered the more fundamental property rights of non-Indians. From this position it was but a short leap to their next argument, which was that the Mashpee were not an Indian tribe and hence had no rights under federal law. All of this rhetoric found its way into the legal process, where it in turn found support in the existing doctrine.

I have tried to make two points in this paper. The first is that the Mashpee became “outsiders” in their own home because of gradual changes in land use and ownership patterns, which were themselves connected to changing voting patterns. And the fact that the Mashpee loss came in steps rather than in a single moment should not invalidate their claim for tribal recognition. My second point is that evidence supporting and illustrating the specific ways in which the Mashpee lost control of their land cannot be found either in doctrine or legal commentary. It is available, however, if one looks to local records. Theorizing about Indian identity alone was not enough to gain federal recognition in *Mashpee*; and in fact reliance on stereotype, from whatever source, contributed to the *Mashpee* loss at trial. What sets Native Americans apart from other groups in this country, after all, is that Native Americans are political minorities whose entire history has proven that they wish to preserve their inherent governmental sovereignty. By this I mean to say that Indian nations have long standing, well-established rights, even under the cases discussed herein, to remain territorially and jurisdictionally separate from the mainstream, if that is what they so wish. These rights ought to be respected, even furthered, especially as against non-Indians who refuse to abide by tribal law in Indian Country. By corollary, in areas like Mashpee, where territorial separateness has been compromised, courts and commentators must insist that the legal process help reveal what is under the surface of stereotype, so that it can help the parties get to the heart of the matter. A far-reaching and rich body of local evidence was overlooked both in the litigation and in the growing literature on *Mashpee*. For this reason alone, *Mashpee* should be reconsidered.



# THE LOGIC OF THE MODERN NATION-STATE AND THE LEGAL CONSTRUCTION OF NATIVE AMERICAN TRIBAL IDENTITY

RICHARD WARREN PERRY\*

## INTRODUCTION

### I. A NATION STATE OF MIND

“Nationalism,” argued Hans Kohn a half-century ago, “is first and foremost a state of mind, an act of consciousness.”<sup>1</sup> As June Starr notes in a companion Article in this volume, nations are hardly the inevitable entities—the natural convergences of blood and territory—that their propagandists insist. Rather, Starr tells us, “nationalistic ideas are ‘social constructs,’ products of particular times, places, and events.”<sup>2</sup> In Benedict Anderson’s recent and immensely influential formulation, the nation is an “imagined community.” “Nationality[,] . . . nation-ness, [and] nationalism,” he tells us, “are cultural artifacts of a particular kind.”<sup>3</sup> The “nation,” Anderson argues, is a form of community

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This Article is a considerably revised version of a paper presented at the 1994 Law & Society Association Annual Meeting in Phoenix, Arizona. It was given as part of a panel entitled *Nationalism Reconsidered: Ethnicity, Marginality, and Identity in State Formation* organized by Leslye Obiora. Other panelists were June Starr and Jo Carillo. Our respondent was Lawrence Friedman. I thank Professor Friedman and the other panelists for their useful comments.

I have been pleased to supervise an award-winning 1994 University of California, Irvine honors thesis on the Federal Acknowledgement Process, *American Indians and the Illusion of Federal Recognition*, by Jody Moore.

I am grateful to the editors of the *Indiana Law Review* and to Charlene Tung for their assistance with this text.

All errors of fact and interpretation remain the personal property of the author.

This Article is dedicated to the work of Allogan Slagle.

1. HANS KOHN, THE IDEA OF NATIONALISM 10 (1944). Benedict Anderson names Kohn as one of the “founding fathers” of the academic study of nationalism. See BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 4 (1991).

2. June Starr, *Passionate Attachments: Reflections on Four Myths of Nationalism*, 28 IND. L. REV. 601 (1995). Professor Starr has identified “four myths of nationalism.” Among these myths are: (1) “One People, One Nation”; (2) “One People, One Territory”; (3) “A People Has a Historic Identity Which Associates It with a Land”; (4) “Religion is Often the Impetus Behind Nationalism.” Starr, *supra*.

3. ANDERSON, *supra* note 1, at 4. Like Starr, Anderson argues that:

[T]o understand [these artifacts] properly[,] we need to consider carefully how they have come into historical being, in what ways their meanings have changed over time, and why, today they command such profound emotional legitimacy. . . . [T]he creation of these [artifacts] towards the end of the eighteenth century was the spontaneous distillation of discrete historical forces; but, that, once created, they became “modular,” capable of being transplanted, with varying degrees of self-consciousness, to a great variety of social terrains, to merge and be merged with a

that—again, notwithstanding the sorts of origin-myths piously invoked by nationalists themselves—“from the start was conceived in language, not in blood.”<sup>4</sup>

This newer understanding of “nation-ness” put forward by Starr and Anderson—that “nationalist ideas are social constructs,” and that the nation itself is an artifact of the political culture, cognition, and discourse peculiar to modernity—has been brought to view by a recent flourishing of scholarship on nationalism that has followed the collapse of the Soviet bloc and the realignment of strategic global politics. This new understanding of nationalism as an “emergent phenomenon,”<sup>5</sup> which itself serves as an organizing principle of modern socio-legal thought, will be my focus as I consider one specific genre of nation-hood claim—an identity assertion whose form is mandated by American law and structured by the conceptual frames of American legal culture. This identity assertion is the Federal Acknowledgement Process (FAP), an administrative law program conducted by the Bureau of Indian Affairs (BIA) under the executive branch authority of the United States Department of the Interior.<sup>6</sup>

FAP regulations specify the narrative genre in which Native American communities must petition the federal government to “acknowledge” them as a “federally recognized Indian tribe.”<sup>7</sup> As Rachael Paschal has described the meaning of federal recognition:

Federal recognition of Indian tribes is a formal political act that establishes government-to-government relationships between the tribes and the United States. Recognition acknowledges both the sovereign status of the tribes and the responsibilities of the United States toward the tribes.<sup>8</sup>

Federal acknowledgement of a particular community as a “recognized Indian tribe” is hardly a matter of tracing the community’s roots simply in order to validate its members’ sentimental attachment to the “authenticity” of their own ethno-historical identity.<sup>9</sup>

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correspondingly wide variety of political and ideological constellations. [We must] also attempt to show why these particular cultural [artifacts] have aroused such deep attachments.

ANDERSON, *supra* note 1, at 4.

4. ANDERSON, *supra* note 1, at 145.

5. The notion of nationalism as an “emergent phenomenon” is discussed in LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 7 (1992).

6. The FAP is the common informal designation for this program, the term used by Congress itself. See, e.g., *Federal Acknowledgement Process: Hearing Before the Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988). The regulations governing the FAP are codified at 25 C.F.R. §§ 83.1-83.11 (1994).

7. See generally Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991). Paschal’s thoughtful assessment of the FAP is one of the very few instances of law review scholarship to consider the acknowledgement process.

8. Paschal, *supra* note 7, at 209.

9. See generally M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 123 (M. Annette Jaimes ed., 1992) [hereinafter GENOCIDE, COLONIZATION, AND RESISTANCE] (discussing the “appropriation of the definition of Indian identity” by the United States). In the view of Lenore Stiffarm and Phil Lane, Jr.:

The first, and perhaps most important, issue [on which the future of Native North America hinges] is whether American Indians will continue to allow themselves to be defined mainly by their

Rather, tribal recognition is necessary for many Native American groups to attain the legal rights due them under federal law and to gain access to resources they need to survive as viable communities. Currently, the United States recognizes approximately 300 tribes, but Paschal cites a BIA estimate that there are at least 230 "extant and functioning tribes" that remain in unrecognized status.<sup>10</sup>

Federal recognition allows Native peoples to exercise a "limited sovereignty over their own territories, which are held in trust for them by the United States."<sup>11</sup> This limited sovereign status confers upon Native peoples limited powers of self-government and provides federal protection against infringement on "tribal lands and powers" by the individual states.<sup>12</sup> Recognition is also frequently required for the protection of native hunting and fishing rights, in addition to being necessary for communities to obtain important federal services. Paschal notes that Indian Health Service eligibility as well as other important education, social service, employment, and housing benefits are all linked to recognized tribal status.<sup>13</sup>

M. Annette Jaimes, a Native American scholar who has studied the question of tribal identity under the law, has described the situation confronted by unrecognized groups as a "Catch-22." She points out the circularity implicit in the "federal criteria for recognition of Indian existence [which are, she says, still in force] to the present day":

1. An Indian is a member of any federally recognized Indian tribe. To be federally recognized, an Indian tribe must be comprised of Indians.
2. To gain federal recognition, an Indian tribe must have a land base. To secure a land base, an Indian tribe must be federally recognized.<sup>14</sup>

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colonizers, in exclusively racial/familial terms (as "tribes"), or whether they will (re)assume responsibility for advancing the more general and coherently political definition of themselves they once held, as *nations* defining membership/citizenship in terms of culture, socialization, and the good of the group.

Lenore Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in GENOCIDE, COLONIZATION, AND RESISTANCE, *supra*, at 23, 45.

10. Stiffarm & Lane, *supra* note 9, at 209 (citing *Federal Acknowledgement Process: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 77 (1988)). Francis Prucha cites a communication to him from the Federal Acknowledgment Branch (the BIA office in charge of processing acknowledgement petitions) that estimated "the number of unrecognized groups as 251, of which 150 might submit petitions." 2 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1196 (1984).

11. Paschal, *supra* note 7, at 212 (citing *Worcester v. Georgia*, 31 U.S. 515, 557-62 (1832)).

12. Paschal, *supra* note 7, at 212 (citing *McClanahan v. Arizona*, 411 U.S. 164 (1973)).

13. Paschal, *supra* note 7, at 213. In addition, the 1988 Federal Indian Gaming Regulatory Act permits recognized tribes rights to establish gambling casinos on their tribal lands in states that otherwise permit gaming. See 29 U.S.C. §§ 2701-2725 (1988). See also Penny Arevalo, *Playing the Odds: Indian Tribes Want Casino Gambling, and Say the Law is on Their Side*, CALIF. L. AND BUS., February 22, 1994, at 8, 31.

14. Jaimes, *supra* note 9, at 33 (citing a report contracted pursuant to P.L. 95-561, Title IV, Section 1147, by Native American Consultants, Inc., submitted to the Office of the Assistant Secretary of Education, U.S. Department of Education, Washington, D.C., January 1980, at 2).

The federal recognition process has received too little attention from legal scholars. This Article will focus upon the specific conceptualization of “Indian tribe” that structures federal recognition as a genre of legal discourse, and upon how the law’s ethno-racial conception of Native American collective identity functions to “normalize”<sup>15</sup> entire populations, under the modern “civic nationalism” of American legal culture.<sup>16</sup>

It is from this perspective that I will look at the logic of national identity embedded in the legal process that determines whether a community is or is not a *federally recognized Indian tribe*. I will argue that the process of federal tribal recognition imposes a narratology for the assertion of ethno-racial nationalist identity whose structure reflects how notions of group identity function in Western-American political culture today.<sup>17</sup> I

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15. I intend the term “normalizing” here in the sense in which Michel Foucault and others have introduced it into recent socio-legal theory.

Foucault argued that, with the rise of the modern state, “law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.” 2 MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY 144 (Robert Hurley trans., 1980). His associate Francois Ewald describes the “norm,” in this sense, both as “a measurement and a means of producing a common standard” and agrees with Foucault that “modernity coincides with the coming of a normative age.” Francois Ewald, *Norms, Discipline, and the Law, in LAW AND THE ORDER OF CULTURE* 141 (Robert Post ed., 1991).

Jonathan Simon has studied the logic of actuarial categories in the contemporary Western social order. Rather than seeking to change people, Simon suggests that the effect of actuarial categories is to “normalize” them in Foucault’s sense, to “manage them in place.” Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 L. & SOC’Y REV. 773 (1988). For a similar view, see also Iain A. Boal, *The Rhetoric of Risk*, 1 PSYCHOCULTURE 2 (1995).

16. Jimmie Durham argues that the word “tribe”

is not a descriptive word, nor a scientific one. Its use in anthropology has been completely discredited, and came from the European concept of progress at the pinnacle of which were the capitals of Europe. “Tribe,” “chief,” and similar words do not describe a part of reality for any people. They are descriptive only within the discourse of enclosure and concealment, for purposes of fabricating impressions of relative primitiveness.

Jimmie Durham, *Cowboys and ... Notes on Art, Literature, and American Indians in the Modern American Mind*, in GENOCIDE, COLONIZATION, AND RESISTANCE, *supra* note 9, at 433. Durham also notes that one

cannot realistically insist that the terminology of modern states be applied, such as “president” or “prime minister.” At best one ends up with “tribal president,” “tribal chair,” or in the case of my own people, “president of the Cherokee Nation of Indians.” In that example, the use of the word “nation” has been rendered synonymous with the word “tribe.” (One does not, after all, refer to the “president of the Nation of France,” or “president of the French Nation.”).

*Id.* To carry Durham’s ironic observation about the notions of race, tribe, and nation invoked by titles such as “the President of the Cherokee Nation of Indians” just one step further, one is even less likely to hear Monsieur Chirac referred to anytime soon as the “president of the French Nation of Caucasians.”

17. My use of the terms “narrative” and “genre” here derive loosely from recent work in cultural and socio-legal studies. See generally HOMI BHABHA, THE LOCATION OF CULTURE 139-197 (1994); Homi Bhabha, *Narrating the Nation*, in JOHN HUTCHINSON AND ANTHONY D. SMITH, NATIONALISM 306-312 (1994); Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff Intervenor*, 28 L. & SOC’Y REV. 1181 (1994).

propose that an investigation of federal tribal recognition standards may tell us something about “identity management” as a technology of governance characteristic of the late modern multi-ethnic state.<sup>18</sup>

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I wish to suggest that an implicit relation exists between this discussion of the use of narrative (or “storytelling,” and other vernacular discursive forms) with the recent focus on the use of narrative by ethnic and racial minority scholars writing within the North American legal academy, especially scholars associated with feminism and Critical Race Theory. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?* 76 VA. L. REV. 95 (1990); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) [hereinafter *Voices of America*]; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); and *see generally Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

The harsh attacks by other legal scholars on these uses of narrative suggest that it is not so much any purely formal consideration of narrative structure that so exercises these critics as it is their understanding that narrative and other vernacular discourse genres have been quite effectively reappropriated as oppositional rhetorical forms. *See, e.g.*, Daniel Farber & Susannah Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).

18. I situate this Article within a recent trend within socio-legal scholarship (and, more broadly, within cultural studies) that focuses on practices of law and governmentality that operate through the management of identities. These identities are formations organized most typically around social and political conceptions of race, ethnicity, language, religion, gender, sexuality, class, and immigration status—and of the multiple intersections among these formations. I have briefly touched upon these questions in an earlier short essay where my co-author and I argued that the American Civil Rights movement of the 1950s and 1960s was not so much the triumph of liberal individualism that recent neo-conservatism has depicted as it was a “fight to expand the social space of all blacks and to rearticulate the political semantics of the collective identity of the descendants of slaves.” *See* Richard Perry and Patricia J. Williams, *Freedom of Hate Speech*, TIKKUN, July/Aug. 1991, at 55, 57.

The notion of “identity management” applied to individual social actors has been current in American social thought at least since Erving Goffman’s foundational work on “the presentation of self in everyday life,” social stigma, and the “management of spoiled identity.” *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SOCIAL IDENTITY (1963). For an example of close analysis of social interaction between a North American Native community and their white neighbors in the style of Goffman, see NIELS WINTHORP BRAROE, INDIAN AND WHITE: SELF-IMAGE AND INTERACTION IN A CANADIAN PLAINS COMMUNITY (1975).

More recent work has focused on how the collective identities that emerge from shared experiences of ethnicity, gender, class, or sexuality are no less constructed and managed than are individual identities. On the management of group identities in late-modern multi-ethnic states, see Duncan Kennedy’s discussion of “group identities” and the “managed heterogeneity” of post-colonial “settler societies” such as the United States in DUNCAN KENNEDY, SEXY DRESSING, ETC. 14-16 (1993); *see also* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); Avery Gordon & Christopher Newfield, *White Philosophy*, 20 CRITICAL INQUIRY 737 (1994); Gary Peller, *Notes Toward a Post-Modern Nationalism*, 1992 U. ILL. L. REV. 1095; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

This Article is not at all intended as an ethnographic study of Native cultures or voices. Quite the contrary, it is offered in the spirit of Gary Peller's proposal that socio-legal scholars should seek to historicize the culture of American legal institutions, in order "to begin to understand these institutions as reflections of a particular, as opposed to universal white culture."<sup>19</sup> Peller recommends the "constructive work of doing voice scholarship on the dominant culture . . . [of] demonstrating what its roots are, its genealogy, what its voice is."<sup>20</sup>

## II. A POLITICS OF IDENTITIES AND ANXIETIES

We hear a great deal these days about something called the "politics of identity." This phrase, as it has been tossed around in contemporary American political discourse, expresses a widely felt, weary cosmopolitan disdain for a certain sort of claim made against the state or its bureaucratic agencies on behalf of a broad range of collectivities.<sup>21</sup>

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19. Peller, *Notes Toward a Post-Modern Nationalism*, *supra* note 18, at 1101. Forty years ago, the anthropologist Clyde Kluckhohn and his collaborator Robert Hackenberg suggested that attention be paid to the culture of that "other tribe," the United States Indian Service. PRUCHA, *supra* note 10, at 943 (citing Clyde Kluckhohn & Robert Hackenberg, *Social Science Principles and The Indian Reorganization Act*, in INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT: THE TWENTY YEAR RECORD 31 (William H. Kelly ed., 1954)).

20. Peller, *Notes Toward a Post-Modern Nationalism*, *supra* note 18, at 1101. For a sampling of this trend, see OMI & WINANT, *supra* note 18; Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1 (1991); Mari Matsuda, *Voices of America*, *supra* note 17; Peller, *Race Consciousness*, *supra* note 18.

Other writings that have influenced this discussion include JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 277-346 (1988); VINE DELORIA JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1988); DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* (1993); DAVID ROEDIGER, *THE WAGES OF WHITENESS* (1993); MICHAEL PAUL ROGIN, *FATHERS AND CHILDREN: ANDREW JACKSON AND THE REMOVAL OF THE AMERICAN INDIAN* (1975); Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, VI CAN. J. OF L. AND JURISPRUDENCE (July 1993); Gordon & Newfield, *supra* note 18; Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Elizabeth Mertz, *The Uses of History: Language, Ideology, and Law in the United States and South Africa*, 22 L. & SOC'Y REV. 661 (1988); Joseph William Singer, *Legal Theory, Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Allogan Slagle, *The Native American Tradition and Legal Status: Tolowa Tales and Tolowa Places*, 7 CULTURAL CRITIQUE 103 (1987); Robert A. Williams, Jr. *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219.

21. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1991). For a far more sophisticated critique of identity politics that focuses on the question of gender identity, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-6, 142-194 (1990).

The content of these group-claims, most typically, is altogether ordinary—demands for increased access to state resources or for enhanced political representation, etc.—but what ultimately makes these claims objectionable to cosmopolitans is that they are grounded in some narrative of the group's collective historical existence—its “identity.”<sup>22</sup>

Of course group-based claims are routinely asserted on behalf of all sorts of constituencies—from religious conservatives to war veterans to populations defined by social welfare categories (e.g., the various managerial classifications of persons “at risk,” such as populations with heightened incidence of HIV infection or of spousal abuse or of drive-by shootings). But the paradigm case of “identity politics” is the kind of claim based upon the specificity of the collective history of an ethnic or racial group (just the sort of narrative mandated by the federal recognition process). Such identity assertions are routinely conflated by their cosmopolitan critics with the range of phenomena that Michael Ignatieff has called the “new nationalism”—with the recent surge of inter-ethnic strife in the post-Cold War world.<sup>23</sup>

This curious lumping of the defense of minority interests and identities within large modern states together with ethno-nationalist, or even racist and fascist, movements elsewhere in the world is typically signaled by the baleful references to “balkanization” that routinely form the substance of attacks upon multi-cultural reforms in American institutions. Supreme Court Justice Anthony Kennedy made one of the most improbable of these comparisons when he likened the Federal Communications Commission's effort to reserve some small number of broadcast licenses for minorities to the white-supremacist apartheid system of South Africa.<sup>24</sup>

According to these new cosmopolitans, civil society is endangered from within and from without by group claims asserted in the rhetoric of militant particularism. In light of this Article's focus on the FAP as an assertion of “ethnic nationalism,”<sup>25</sup> it is worth noting that when critics of identity politics wish to express especial contempt for any specific identity claim, they call it “tribalism.”<sup>26</sup>

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22. For one of the most influential recent discussions of these issues, see CHARLES TAYLOR, *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* (1992).

23. MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993).

24. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3046 (1990) (Kennedy, J., dissenting). For a rather different view, see Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990); see also Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 n.49 (1992).

25. I take the term “ethnic nationalism” from Michael Ignatieff's widely noted recent book. IGNATIEFF, *supra* note 23, at 5. I shall discuss Ignatieff's distinction between “ethnic nationalism” and what he calls “civic nationalism” later in this Article. See *infra* text accompanying notes 90-96.

26. As Patrick Macklem has observed in a recent essay, “What some regard as the nurturing of cultural difference, others view as a dangerous new form of tribalism.” *Distributing Sovereignty: Indian Nations and the Equality of Peoples*, 45 STAN. L. REV. 1311, 1313 (1993).

See also Tony Judt's observation that “For a long time, the conventional wisdom was that such ‘tribal’, ideological alliances were *passé*.” *The New Old Nationalism*, N. Y. REV. OF BOOKS, May 26, 1994, at 44; JOEL KOTKIN, *TRIBES: HOW RACE, RELIGION, AND IDENTITY DETERMINE SUCCESS IN THE NEW GLOBAL ECONOMY* (1992).

## III. INDIANS, TRIBES, NATIONS, STATES

A. *The Cult of the Vanishing Native American*

The “Indian” as a concept of the European and Euro-American imagination has had a long history as a focal point for concerns about political and cultural identity.<sup>27</sup> Reports of the Native peoples of North America influenced Thomas Hobbes’s view of humankind in the “state of nature.”<sup>28</sup> According to John Locke’s conjectural history, “in the beginning all the world was America.”<sup>29</sup> Locke’s belief that a “king of the large and fruitful territory [of North America] feeds, lodges, and is clad worse than a day-laborer in England” and that the vast North American continent had been left a wilderness and a wasteland by its Native peoples “for want of improving it by their labor” provided subsequent generations of colonists with a natural rights rationale to dispossess the indolent Native peoples in favor of industrious Christians.<sup>30</sup> According to de Tocqueville:

The Indian, in the dreary solitudes of his woods, cherishes the same ideas, the same opinions, as the noble of the Middle Ages in his castle. . . . Thus, however strange it may seem, it is in the forest of the New World, and not among the Europeans who people its coasts, that the ancient prejudices of Europe still exist.<sup>31</sup>

Peter Fitzpatrick notes that the European Enlightenment came to identify use of tradition and custom as a source of law with the “reduced remnants of the ‘small-scale’ peasant community [and] with the ‘savages’ . . . of North America,” with all that remained “outside of the inexorable reason of Enlightenment and outside of the universal truth of humanity.”<sup>32</sup>

Contemporary literary historians have identified a veritable “cult of the vanishing American” in nineteenth century Euro-American culture.<sup>33</sup> This cult was based on a

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27. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); PRUCHA, *supra* note 10; Jaimes, *supra* note 9.

28. THOMAS HOBBES, *LEVIATHAN* (E.P. Dutton & Co. 1950) (1651).

29. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 343 (1963) (1690).

30. *Id.* at 338-39. See also WILLIAMS, *supra* note 27, at 246-51 (discussing the influence of Locke’s views of North America and its peoples). This Lockean theory of property underlaid Justice John Marshall’s acceptance of the Doctrine of Discovery in *Johnson v. McIntosh*, 21 U.S. 503 (1823). WILLIAMS, *supra* note 27, at 246-51.

31. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 344 (1966) (1831, first English translation 1835).

32. Peter Fitzpatrick, *The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment*, in *POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION, AND THE DEATH OF MAN* 90, 92-93 (Anthony Carty ed., 1990) [hereinafter POST-MODERN LAW].

Elizabeth Mertz speaks of how European theories of progress have characteristically conscripted colonized indigenous peoples to “stand for”—as in an historical *tableau vivant*—some earlier, more primitive stage in the Europeans’ own narratives of societal development. Mertz, *supra* note 20. See generally GOLDBERG, *supra* note 20.

33. See Lora Romero, *Vanishing Americans: Gender, Empire, and the New Historicism*, 63 AM. LITERATURE 385 (1991). See also ANDREW ROSS, *THE CHICAGO GANGSTER THEORY OF LIFE: NATURE’S DEBT*

"belief that the rapid decrease in the [N]ative population was both spontaneous and inevitable."<sup>34</sup>

Lora Romero invokes Renato Rosaldo's notion of "imperialist nostalgia" to account for this cult among Euro-Americans. This is "a particular kind of nostalgia," Rosaldo tells us, "where people mourn the passing of what they themselves have transformed." It is, he says, "a form of longing . . . closely related to secular notions of progress." As Euro-Americans followed their manifest destiny across the continent, they sentimentalized the progressive disappearance of the Native population. They regarded this extinction as the inevitable price of the civilizing process, a price which—despite their pangs of nostalgia (or perhaps *because of* them)—they managed to resign themselves to having the natives pay. Rosaldo notes that "[w]hen the so-called civilizing process destabilizes forms of life, the agents of change experience transformations of other cultures as if they were personal losses."<sup>35</sup> He describes how Euro-Americans "began to deify nature and its Native American inhabitants . . . at the same time that [they] intensified their destruction of [North America's] human and natural environment."<sup>36</sup> A theme of vanishing *Indian* identity has long served as a sort of elegiac counterpoint to the triumphal fanfare of the common "white" man that has been the anthem of Euro-American discourse of progress.<sup>37</sup>

TO SOCIETY 24 (1994).

34. The leading texts of the cult remain school classics: Henry Wadsworth Longfellow's *Hiawatha* and the *Leatherstocking* novels of James Fenimore Cooper, especially *The Last of the Mohicans*. From my experience as an American schoolchild, I can attest that the leading texts of this cult remained elementary classroom standards as late as the 1960s. My third grade class in Michigan was taught to recite in unison Henry Wadsworth Longfellow's *Hiawatha*, accompanied by a pseudo-Indian sign-language pantomime; and James Fenimore Cooper's *The Last of the Mohicans* was required reading in my high school.

See also Benedict Anderson's discussion of Cooper's *The Pathfinder* as an example of the American nationalist sentimentalization of the "bloodbrotherhood" that binds "the 'white' woodsman Natty Bumppo and the noble Delaware chieftain Chingachgook." ANDERSON, *supra* note 1, at 202.

35. RENATO ROSALDO, CULTURE AND TRUTH 69-70 (1989). See also Romero, *supra* note 33, at 402.

36. ROSALDO, *supra* note 35, at 71. We might wonder at just what moment in the nineteenth century white imagination did the figure of the "Indian" shift from being a symbol of Euro-Americans' feared "Other" to being the "logo" of the United States government itself in the friendly, solid reproducibility of the "Indian-head" penny. How did "Indian-ness" attain a nearly infinite iterability as the emblem of Euro-American manly vigor: the "Indian" as totemic symbol for school and professional sports teams (The Stanford Indians, the Cleveland Indians, The Washington Redskins, etc.); automobiles (the Pontiac Superchief); etc. (I borrow the notion of the "logo-ization" from Benedict Anderson's discussion of the appropriation of local ethnic imagery to forge nationalist consciousness during the colonial era in Southeast Asia. ANDERSON, *supra* note 1, at 178-85.)?

37. For one of the most remarkable examples of this nostalgic affection for "the vanishing Indian," see THEODORA KROEBER, *ISHI IN TWO WORLDS: A BIOGRAPHY OF THE LAST WILD INDIAN IN NORTH AMERICA* (1961). She recounts how the appearance of Ishi, the last survivor of the Yahi people, aroused a widespread passionate interest among the general American public in 1911.

Ishi was one of a small number of Yahi who hid for decades in the Mt. Lassen region after their community had been all but exterminated by white settlers. After he had outlived the rest of his group, Ishi came out of hiding and walked into Oroville, California—and became an instant celebrity. Under the supervision of Theodora Kroeber's husband, the anthropologist Alfred Kroeber, Ishi spent the last years of his life as a sometime

Yet, as events in fact turned out, the nineteenth century campaign to exterminate the Native population was not entirely successful,<sup>38</sup> and from today's perspective the cult of the vanishing Indian appears as a curious, premature aestheticization of a genocide *manqué*. The 1990 United States census reports a Native population of more than 1.6 million. Against the background of the recent debates over the politics of collective identity, the socio-legal question of the meaning of the status of "Indian tribe" has once again come to the fore.

### *B. A Casino in Connecticut: The Reservation as Theme Park and Other Trials of Indian Identity*

In the Eastern United States, in recent years, a series of lawsuits seeking the return of native lands have highlighted what is at issue in determining the socio-legal identity of an "Indian tribe." In the largest of these cases, in 1980, the Passamaquoddy and Penobscots of Maine were awarded three hundred thousand acres of land and twenty-seven million dollars in compensatory damages for territories that had been taken from them without valid legal title.<sup>39</sup> In another northeastern case that went to trial in the late 1970s, the Narragansetts of Rhode Island were obliged to meet the tribal definition criteria that had been laid down in a 1901 United States Supreme Court decision, *Montoya v. United States*.<sup>40</sup> Following *Montoya*, the burden of proof was placed on the Narragansetts to prove that they were "a body of people of same or similar race, united in community under one leadership, and inhabiting a particular though sometimes ill-defined territory."<sup>41</sup> Ultimately, the Narragansetts received both federal recognition and 1800 acres of land in 1978.<sup>42</sup>

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living exhibit and sometime assistant janitor in the anthropology museum of the University of California. In her concluding chapter, entitled *Death in a Museum*, Kroeber describes how Ishi died of tuberculosis in 1916 in the room of the museum that housed the Pacific Island exhibit.

Of course one variant of this "imperialist nostalgia" for the "vanishing American" is still evident in the fact that the image of the "crying Indian" became the logo for Euro-American environmentalist concern. This is a concern, however, not about the plight of Native peoples themselves but rather about the deterioration of geographic locations—understood as the nation's endangered natural resources—from which the Natives have been removed. Andrew Ross notes that this "American model" of conservationism has been taken up in Africa, Amazonia, the Pacific islands, and elsewhere. It "had its origin," he says, "in John Muir's Yosemite, created by excluding the Miwok Indians, followed by the eviction of the Ute and Navajo Indians from Bryce and Zion." ROSS, *supra* note 33, at 91-92.

38. Of course many groups were wiped out entirely and estimates of the reduction in the Native population of North America as a whole vary from 70% to well over 90%. The 1900 census listed approximately 200,000. See Stiffarm and Lane, *supra* note 9.

39. Ward Churchill reports that these lands had in fact been taken despite written assurances from George Washington himself. See Ward Churchill, *The Earth is Our Mother: Struggles for Land and Liberation in the Contemporary United States*, in *GENOCIDE, COLONIZATION, AND RESISTANCE*, *supra* note 9, at 139, 150-51. See also Maine Indian Land Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1988).

40. 180 U.S. 261 (1901).

41. *Id.* at 266.

42. Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798 (1976). See Churchill, *supra* note 39.

In a case that highlighted the ironies surrounding the contemporary legal understanding of Indian tribal identity, in 1983 the Mashantucket Pequot people of Connecticut were able to recover, over the opposition of the Reagan administration, 800 acres of their former lands (of 2000 acres that had been set aside for them in 1686 and later reduced by encroachment to 184 acres).<sup>43</sup>

The Pequots have since constructed a casino and entertainment complex on their land, which has become one of the most profitable economic enterprises in the state of Connecticut.<sup>44</sup> The residents of the nearby town of North Stonington have recently sought to block the Pequots' plans to expand their entertainment facilities and landholdings. With tenuous legal grounds for opposing the Pequots' expansion, these townspeople—clearly a group not much impeded by any sense of historical irony—have resorted to arguing against the Pequots' plans on the basis of custom, historical tradition, and the sheer antiquity of Euro-American settlement. North Stonington was established in 1717. As one spokesperson for the townspeople (identified as having resided in the area since 1971) lamented to the *Los Angeles Times*, "We have a history, we have a heritage."<sup>45</sup>

The most celebrated of these New England cases hinged precisely upon the determination at trial of whether one Native community's identity met the *Montoya* definition of "Indian tribe." As Ward Churchill reports, the Wampanoags of the Mashpee area of Cape Cod

filed suit in 1974 to recover about 17,000—later reduced to 11,000—of the 23,000 acres that were historically acknowledged as being theirs. . . . At trial, the all-white jury, all of whom had property interests in the Mashpee area, were asked to determine whether the Wampanoag plaintiffs were "a tribe within the meaning of the law." After deliberating for twenty-one hours, the jury returned with the absurd finding that they were not such an entity in 1790, 1869, and 1870 (the years that were key to the Indians case), but that they *were* in 1834 and 1842 (years during which that they were a "tribe" for purposes of ceding land to the government).<sup>46</sup>

James Clifford's 1986 essay, *Identity in Mashpee*, has placed the Mashpee case in the center of recent debates over the politics of identity.<sup>47</sup> The issue at trial was whether the

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43. The Mashantucket Pequot Tribe Indian Claims Settlement Act of 1983, 25 U.S.C. §§ 1751-1760 (1988). *See* Churchill, *supra* note 39, at 150.

44. Jonathan Weber, *Turning the Tables: Tribe's Casino Success Upsets Rural Area's Power Structure*, L.A. TIMES, February 13, 1994, at D3, D5.

45. *Id.*

46. *See* Churchill, *supra* note 39, at 150 (discussing Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979)). *See also* Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511 (1995).

47. For a partial list sampling of this debate, *see* JACK CAMPISI, THE MASHPEE INDIANS: TRIBE ON TRIAL (1991); CLIFFORD, *supra* note 20, at 280; Walter Benn Michaels, *The No-Drop Rule*, 20 CRITICAL INQUIRY 758 (1994); Walter Benn Michaels, *Race into Culture: A Critical Genealogy of Cultural Identity*, 18 CRITICAL INQUIRY 655 (1992); Gordon & Newfield, *supra* note 18; Gerald Torres & Kathryn Milun, *Translating*

Mashpee could reframe their identity to fit the American legal conception of “tribe,” in which racial, ethnic, and political notions of group identity intersect. Clifford observes that “[a]lthough the trial was formally about ‘tribal’ status, its scope was considerably wider.” One central underlying concern, says Clifford, was “[t]he idea of cultural wholeness and structure” implicit in the *Montoya* “definition of tribe.” Clifford suggests that, although the *Mashpee* court relied upon the legal definition of “Indian tribe”—based on “race, territory, community, and government”—these *Montoya* criteria invoked a notion of culture, emerging in 1901, as “a multifaceted, whole way of life, determined neither by biology or politics . . . [which had become] by 1978 . . . part of the trial’s common sense.”<sup>48</sup>

The logic of ethno-racial identity embedded in American legal discourse and culture was what most intrigued Clifford as a historian of ideas. He found that the *Mashpee* court had behaved like an analytic philosopher “who wanted to know positively whether a cat was on the mat in Mashpee.”<sup>49</sup> It applied an “either-or logic” to the question of tribal status.<sup>50</sup> The court, in Clifford’s words, “imposed a literalist epistemology” according to which “Indian identity could not be a real yet essentially contested concept. It had to exist or not exist as an objective documentary fact persisting through time.”<sup>51</sup>

“In this trial,” says Clifford, “the facts” did not speak for themselves.<sup>52</sup> The trial was “a contest between oral and literate forms of knowledge” in which the court ultimately imposed a “hierarchical distinction.”<sup>53</sup> In effect, the text-based discourse genres of Euro-American legal culture reframed the vernacular forms through which the Wampanoags’ understood their identity. The Wampanoags, Clifford says, were effectively “trapped by the stories that could be told about them. . . . Tribal life had to be emplotted, told as a coherent narrative.”<sup>54</sup> Similarly, in Gerald Torres and Kathryn Milun’s study of the *Mashpee* trial, they argue that “[i]n order for the state to hear their claims, [the Wampanoags] were forced to speak in a formalized idiom of the language of the state, the idiom of legal discourse.”<sup>55</sup> They suggest that:

[T]he dimension of power hidden in the idiomatic structure of legal storytelling forecloses one version in favor of another. . . . The law does not permit the *Mashpee*’s story to be particularized and still be legally intelligible. By

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YONNONDIO *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625 (1990).

48. CLIFFORD, *supra* note 20, at 337. See *Montoya*, 180 U.S. at 266.

49. CLIFFORD, *supra* note 20, at 336.

50. CLIFFORD, *supra* note 20, at 341.

51. CLIFFORD, *supra* note 20, at 340. As Gordon and Newfield note, “Clifford describes the *Mashpee* as attempting to establish a valid *tribal* rather than a *cultural* identity; culture comes up as a demand of the court.” *Supra* note 18, at 745.

52. CLIFFORD, *supra* note 20, at 342.

53. CLIFFORD, *supra* note 20, at 339.

54. CLIFFORD, *supra* note 20, at 342.

55. Torres & Milun, *supra* note 47, at 628. As they maintain: “The telling of stories holds an important role in the work of courts. Within a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places.” Torres & Milun, *supra* note 47, at 628.

imposing specific ethno-legal categories such as “Tribe” on the Mashpee, law universalizes their story. This universalizing process eliminates differences the dominant culture perceives as destabilizing.<sup>56</sup>

“In fact,” observes Clifford,

only a few basic stories are told, over and over, about Native Americans and other “tribal” peoples. These societies are always either dying or surviving, assimilating or resisting. Caught between a local past and a global future, they either hold on to their separateness or “enter the modern world.” The latter entry—tragic or triumphant—is always a step toward a global future defined by technological progress, national and international relations. Are there other possible stories?<sup>57</sup>

#### IV. TRIBALISM ABROAD: ON THE NEW CONSCIOUSNESS OF THE NEW NATIONALISM

Nationalism, one hears, is very much on the upswing all around the world these days. What Michael Ignatieff has called the “new nationalism” is widely regarded as a “return of the repressed.”<sup>58</sup> It is looked upon as a terrifying, quasi-volcanic outpouring of atavistic, pre-modern urges, of just the sort of impulses generally assumed to have been left behind in the early stages of modern state-formation.

Nationalism’s fortunes have fluctuated wildly over the last decade or so. Only a couple of years ago nationalism was all but declared extinct when, after the bi-centenary celebrations of the American Constitution and the French Revolution, the political classes in the West were eagerly anticipating a scheduled event that was billed as the “unification of Europe.” This was the moment when, in the wake of what was widely seen as the “Fall of Communism” and the final triumph of the free market, the Enlightenment hope of a universal convergence of reason and the social order was at long last to become reality. The moment of Europe’s unification was announced by Francis Fukuyama as the “End of History.”<sup>59</sup> And surely no one was more eager for the old history of ethno-nationalist rivalries and conflicts to end than the German legal theorist Jürgen Habermas. For Habermas, “Europe as a whole [was] being given a second chance.”<sup>60</sup> This was a grand, universal vision, of a sort not much observed in European politics since Napoleon the First was last observed acting as Hegel’s messenger of the world-spirit. This vision seems

56. Torres & Milun, *supra* note 47, at 630. Torres and Milun argue that: “We should suspect that the legal coding through which such translation is conducted highlights a problem inherent in the post-modern condition—the confrontation between irreconcilable systems of meaning produced by two contending cultures.” Torres & Milun, *supra* note 47, at 629 (footnote omitted).

57. CLIFFORD, *supra* note 20, at 342.

58. IGNATIEFF, *supra* note 23, at 5.

59. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

60. Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, Keynote Address presented at the Conference on European Identity, Brussels, Belgium (May 1991) (on file with author). See *Quel Identité pour l’Europe?*, in *L’EUROPE AU SOIR DU SIECLE* (Nicole Dewandre & Jaques Lenoble eds., 1992).

to have slipped away almost without notice and now, in the Spring of 1995, it seems almost beyond recalling.

It has, in my view, been too little remarked that things in Europe have not exactly turned out as planned. There is no question that the array of changes commonly grouped under the label of "globalization" has continued or even accelerated. But the apotheosis of modern reason that was to be the new Europe—not to mention the "New World Order"—is nowhere to be seen. The historian Tony Judt observed recently that "[i]n place of these universal Europes of our fond imaginings we are faced now . . . with a bizarre resurrection of the ghosts of particularism."<sup>61</sup>

It now seems clear that the fall of the Berlin Wall hardly signaled the end of ethnic particularism. As our virtual global village watched on CNN, tens of thousands danced atop the crumbling wall to the tune of Beethoven's *Ode to Joy*. But the lyrics that went with the music—*Ein Land! Ein Volk! Einheit! Einheit! Deutschland!*—sounded a note rather more *Volkisch* than one might expect of a hymn to universal reason. In fact, in the years since 1991, Western Europe has been the scene of an apparently implacable revenge of the particular against the universal. This has meant the bristling resurgence of local ethno-national identity claims in Scotland, Wales, Lappland, Friesland, Flanders, Wallonie, Brittany, Lombardy, Catalonia, Euskadi, etc.

To know the status of universal reason in Central and Eastern Europe, one need only call to mind the newly minted Czech Republic and its former Siamese twin, Slovakia; or whisper the new-old names "Slovenia," "Bosnia," "Croatia," "Serbia," "Kosovo," "Montenegro," "Macedonia"—shadow entities that recalled to life Judt's "bizarre ghosts," a parade of nationalist undead, stepping stiff-legged from the cold-storage vault of frozen identities (as scandalized political observers constantly depict the former Yugoslavia). And looking eastward from the Balkan killing fields, a student of the new nationalism must struggle to keep up with the lengthening inventory of the newly and fiercely assertive shards of the former Soviet Union that now lay claim to national identity: Lithuania, Latvia, Estonia, Belarus, Ukraine, Moldavia, Georgia, Chechnya, Ossetia (North and South), Abkhazia, Armenia, Azerbaijan, Kirgizia, Tadzhikistan, and Uzbekistan (and this list, which does not even count such deterritorialized populations as the Crimean Tatars and Volga Germans, will surely be longer still before this Article sees print).<sup>62</sup>

History seems not to have slowed much outside of Europe either. Apparently, somebody forgot to let the Hutus and the Tutsis in on the news that ethnic feuds are *passé* and that we are all deracinated modern individuals these days. Nor, in the waning days of South Africa's apartheid regime, did large numbers of Afrikaaners or Zulus seem to have understood that ethno-nationalism had gone out of style. Neither did word of communal identity's irrelevance show much sign of having been heard in Eritrea, Sudan, Liberia, Angola, Cyprus, Palestine, Kurdistan, Kashmir, the Punjab, Sri Lanka, Tibet, Burma, Timor, Peru, Guatemala, Chiapas, Quebec, or California.

So, briefly put, as things have turned out, the odds are not looking good that European unification—let alone the "End of History"—will arrive before the end of the millennium. The "key narrative of the new world order," argues Michael Ignatieff, "is the

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61. Judt, *supra* note 26, at 44.

62. Tony Judt notes that approximately 26 million ethnic Russians are "stranded in someone else's state." Judt, *supra* note 26, at 47.

disintegration of nation-states into civil war; the key architects of that order are warlords; and the key language of our time is ethnic nationalism.”<sup>63</sup> The implications of these developments for our understanding of the contemporary scene have been too little commented upon in recent socio-legal scholarship.

## V. MODERNIZATION AND ITS DISCONTENTS: LESSONS FROM THE RECENT BOOM IN SCHOLARSHIP ON NATIONALISM

### A. *The Big Narrative of Modernity*

A canonical narrative exists in Western political culture and socio-legal theory of a quite specific form of historical change that we call “modernization.” According to this vision, as Lawrence Friedman has described it, “[t]he societies of the Western world seem to be traveling together, on a single master-journey, tracing a single line of evolution.”<sup>64</sup>

This plot, the itinerary of Friedman’s “master-journey,” is of course just the sort of story that skeptics have come to call a “grand narrative”—indeed, the modernization story is arguably *the* “grand narrative.”<sup>65</sup> This plot line of socio-political development is so familiar, so implicitly accepted, that one needs only to utter the word “development” (as for example in the academic specialization called “Development Studies”) and everyone knows just what sort of development is meant.<sup>66</sup>

This familiar narrative traces the path to “modernity” followed by a “developing nation” along a well-marked “upward” trajectory. In the standard North Atlantic model, this is a climb up from *Gemeinschaft* to *Gesellschaft*, up from race, culture, ethnicity, tribe, or clan toward liberal autonomy; up from status to contract; up from plowshares to personal computers; up and out of the dark shadows of traditional culture and kinship-based community toward the redemptive light of civic individualism. This is the “single line of evolution” toward what Friedman nicely calls *The Republic of Choice*.<sup>67</sup>

This modernization narrative, in one version or another, is so unreflectively presupposed by so much of Western social thought that it goes about its business much of the time utterly unremarked, tacitly framing our understanding of history and social organization. But the unexpected “resurrection of the ghosts of particularism”<sup>68</sup> is a turn of events that cannot be accommodated within the standard modernization narrative. The “new nationalism” has called into question the modernization story’s pretension to

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63. IGNATIEFF, *supra* note 23, at 5.

64. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE* 47-48 (1990).

65. The best-known discussion of the “grand narrative” is JEAN-FRANCOIS LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* (1984).

66. For a critical review of the specifically legal variant of development studies, “law and modernization,” see David Trubek & Marc Galanter, *Scholars in Self-Estrangement*, 1974 WIS. L. REV. 1062, 1078-80. In connection with the experience of Native Americans, *see also* Joel Martin’s discussion of the “gaze of development” in his remarkable history of the Muskogee people’s confrontation with European invasion and ongoing colonization in the early modern era. JOEL MARTIN, *SACRED REVOLT: THE MUSKOGEEES’ STRUGGLE FOR A NEW WORLD* 87 (1991).

67. FRIEDMAN, *supra* note 64, at 47-48.

68. *See* Judt, *supra* note 26, at 44.

universality and inevitability, and has thereby unsettled the status of our knowledge about the social world.

The modern world, or more accurately, the “modern” vision overlaid on world history by the European Enlightenment traditions, Judt tells us, has “rested upon an optimistic universalism which bequeathed us both liberalism and socialism, both competing visions of a progressive emancipatory project.”<sup>69</sup> Noting a “widespread ‘cosmopolitan disdain and astonishment’ at the ferocity of peoples’ demands for their own nation-state,” Judt observes that “[f]or liberals and Marxists alike, national attachments and their attendant emotions make no rational sense in the contemporary world.”<sup>70</sup>

*B. The Marxian Account of Nationalism: The World Spirit Gets the Address Wrong*

The appearance of ethno-nationalism amongst the rubble of the collapse of East European state-socialism has attracted more attention than anywhere else. The long-standing orthodox Marxian version of the modernization narrative has regarded nationalist consciousness as, at best, a sort of ideological way station, a transitory stage, on the road to the historical realization of class-consciousness.<sup>71</sup> Ernest Gellner scornfully calls this version the Marxian “Wrong Address Theory” of nationalism.<sup>72</sup> According to Gellner,

Marxists basically like to think that the spirit of history or human consciousness made a terrible boob. The awakening message was intended for *classes*, but by some terrible postal error was delivered to *nations*. It is now necessary for revolutionary activists to persuade the wrongful recipient to hand over the message, and the zeal it engenders, to the rightful and intended recipient. The unwillingness of both the rightful and the usurping recipient to fall into line with this requirement causes the activist great irritation.<sup>73</sup>

Judt suggests that the reasons for orthodox Marxism’s failure to come to terms with the persistence of nationalism are “related to its inability to account for its own demise.”<sup>74</sup>

Outside the former Soviet bloc, scholars working in the Western Marxist tradition have been freer to acknowledge that, as Benedict Anderson puts it, “nationalism has proved an uncomfortable *anomaly* for Marxist theory and, precisely for that reason, has

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69. Judt, *supra* note 26, at 50.

70. Judt, *supra* note 26, at 44 (citing IGNATIEFF, *supra* note 23).

71. Marx himself, says Judt,

divided mid-nineteenth century Europe into “historic” nations and others; the latter, mostly small Slav peoples, were consigned to eventual oblivion. His heirs treated national sentiment as an illusion, induced by manipulated ignorance and a collective misapprehension of interest. Marxism could not, however, account for the persistence and resurfacing of nationalist sentiment . . . or for the apparently deep-seated attachment to ethnic or other affiliations of people who could not indefinitely be dismissed as suffering from a collective hallucination.

Judt, *supra* note 26, at 45.

72. ERNEST GELLNER, *NATIONS & NATIONALISM* (1983).

73. *Id.* at 129-30.

74. Judt, *supra* note 26, at 45.

been largely elided, rather than confronted.”<sup>75</sup> But Anderson and other scholars working in the critical tradition have not retreated into either silent dismay or dogmatic denial. The political collapse of the Warsaw Pact states and the recent worldwide bull market in nationalisms have been met by a remarkable flourishing of scholarship on the topic. Anderson himself remarks that, during this period, “the study of nationalism has been startlingly transformed in method, scale, sophistication, and sheer quantity.”<sup>76</sup> This new wave of scholarship has shown that Marxism is hardly alone in its failure to account for the persistence of ethnic particularism.

*C. The Liberal View of the New Nationalism:  
A Pathology of Incomplete Modernity*

Much like the Marxian account, the specifically liberal version of the modernization narrative—the vision whose culmination in the unification of Europe and the “End of History” was so keenly anticipated during the Reagan-Thatcher era—has imagined that the “era of nation-state-making was the necessary prelude to a world of constitutional states and equal citizens.”<sup>77</sup> According to Judt:

It therefore made sense that liberalism and nationalism were intertwined in nineteenth-century European politics. Traditional liberal thinkers, however, could not sympathize with the later problem of smaller communities within or between such states, such as the Slovaks or the Flemish, seeking a distinctive national and international identity in preference to, and often instead of, civic equality and democratic rights. Rightly regarding these demands as a threat to the liberal state, historians and political theorists grew unsympathetic to nationalism, treating its presence as a pathological condition of incomplete “modernity.”<sup>78</sup>

75. ANDERSON, *supra* note 1, at 3. Anderson is himself a leading scholar of nationalism whose work has important roots in the Western Marxist tradition. In the preface to the 1991 second edition of his pathbreaking work *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM*, Anderson notes that the “immediate occasion” for his original 1983 text had been the “armed conflicts of 1978-79 in Indochina” and the fact that these nationalist struggles had left him “haunted by the prospect of further full-scale wars between the socialist states.” *Id.* at xi.

76. Anderson’s own treatment is cited in *supra* note 1. Other works that he cites as “key texts” include: J.A. ARMSTRONG, *NATIONS BEFORE NATIONALISM* (1982); JOHN BREUILLY, *NATIONALISMS AND THE STATE* (1994); P. CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD* (1986); GELLNER, *supra* note 72; ERIC HOBSBAWM, *NATIONS AND NATIONALISM SINCE 1788* (1990); MIROSLAV HROCH, *SOCIAL PRECONDITIONS OF NATIONAL REVIVAL IN EUROPE* (1985); and, ANTHONY SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1986). ANDERSON, *supra* note 1, at xii.

A recent monograph that highlights the links between nationalism, the sociology of language, and the construction of social space is COLIN WILLIAMS, *CALLED INTO LIBERTY: ON LANGUAGE AND NATIONALISM* (1993). The discussion of the “paradigms of race, ethnicity, and nation” in Part I of OMI & WINANT, *supra* note 18, is helpful in understanding the American situation.

77. Judt, *supra* note 26, at 44.

78. Judt, *supra* note 26, at 44. See also JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick Lawrence trans., 1987); Jürgen Habermas, *Modernity: An Unfinished Project*, in THE

Jürgen Habermas, the German socio-legal theorist, whose intellectual trajectory has taken him from Western Marxist Frankfurt School beginnings to the ramparts of contemporary neo-liberalism, stands among the most truculent defenders of the Enlightenment modernization narrative. He argues that any particularist identity claim is a pathological affront to the universalist aspirations that define the project of modernity.<sup>79</sup> According to Habermas's straightforward evolutionary version of the modernization story, nationalism was an early stage in the modernization process, a necessary prelude to the construction of the modern nation-state as *Rechtstaat*, or government of laws. He argues that “[t]he nation-state and democracy are the twins born out of the French revolution . . . [but f]rom a cultural point of view, both have been growing in the shadow of *nationalism*.<sup>80</sup>

This early nationalist stage, Habermas says, laid “the foundations for the cultural and ethnic homogeneity on the basis of which it then proved possible to push ahead with the democratization of government since the late eighteenth century.”<sup>81</sup> In his interpretation, nationalism is a “specifically modern phenomenon of cultural integration[,] . . . [a] type of consciousness [that] is formed in social movements and [which] emerges from modernization processes at a time when people are at once both mobilized and isolated as individuals.”<sup>82</sup> “Nationalism,” Habermas maintains,

is a form of collective consciousness which both presupposes a reflective appropriation of cultural traditions that have been filtered through historiography and [which] spreads only via channels of modern mass communication. Both of these elements lend nationalism the artificial traits of something that is to a certain extent a construct, thus rendering it by definition susceptible to manipulative misuse by political elites.<sup>83</sup>

To those familiar with the main themes of Habermas's massive body of work, it will be apparent that his observation that “nationalism” is “by definition susceptible to manipulative misuse by political elites,” must be read against the backdrop of German history since the rise of Nazism, which Habermas witnessed as a child. Despite the weight of this history, and even though Habermas acknowledges that the “homogeneity” of the nation-state was “achieved at the cost of excluding ethnic minorities,”<sup>84</sup> he maintains that the modern state has managed to rise above its distasteful origins in a “form of collective consciousness.”

Habermas defines his “modern understanding of republican freedom” in opposition to any “concept of popular sovereignty [which owes] its identity to a prior homogeneity of descent or form of life.”<sup>85</sup> Instead, for Habermas, the distinctively modern understanding of the nation-state is grounded on the “procedural rationality of political

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POST-MODERN READER (Charles Jencks ed., 1992).

79. See HABERMAS, *supra* note 78; Habermas, *supra* note 78.
80. Habermas, *supra* note 60, at 3 (italics in original).
81. Habermas, *supra* note 60, at 3.
82. Habermas, *supra* note 60, at 3.
83. Habermas, *supra* note 60, at 3-4.
84. Habermas, *supra* note 60, at 3.
85. Habermas, *supra* note 60, at 6.

will-formation.”<sup>86</sup> Curiously enough, however, given that he so vehemently rejects the notion of a community of language, culture, and history as a basis for socio-political belonging, what ultimately guarantees for Habermas the requisite “procedural rationality of political will-formation” in citizenship-praxis is precisely the “discursive character” he posits for it.<sup>87</sup> The distinguishing mark of this discursive, procedural rationality is the fact that it is grounded in a hypothetical consensus among autonomous citizens conceived as rational participants in an “ideal speaker-hearer relation.” And for Habermas, it is fortunate that “modern law [provides a public] medium which allows for a much more abstract notion of the citizen’s autonomy.”<sup>88</sup> In a recent *Los Angeles Times* interview, when asked to characterize the key insight that runs through all his work, Habermas offered his belief that there is a “form of unrestrained communication [which] brings to the fore the deepest force of reason, [and] which enables us to overcome egocentric or ethnocentric perspectives and reach an expanded . . . view.”<sup>89</sup>

Michael Ignatieff’s 1993 book, *Blood and Belonging: Journeys into the New Nationalism*,<sup>90</sup> is a widely noted comparative study of nationalist movements in Croatia and Serbia, Germany, Ukraine, Quebec, Kurdistan, and Northern Ireland, which, like Habermas’s account, essentially accepts the Enlightenment narrative on its own terms. Much as Habermas has re-envisioned his modern “nation of citizens” as a form of purely procedural political organization contrary to the earlier “ethnic” conception of the nation-state, Ignatieff posits a bi-polar contrast between two distinct visions, “civic nationalism” and “ethnic nationalism,” two models that he presents effectively as contrasting ideal types between which the future must choose.

Ignatieff locates the roots of “ethnic nationalism” in the German anti-Enlightenment backlash against Napoleon’s invasion of the German principalities. The French conquest, he says,

unleashed a wave of German patriotic anger and polemic against the French ideal of the nation-state. The German Romantics argued that it was not the state that created the nation, as the Enlightenment believed, but the nation, its people, that created the state. What gave unity to the nation, what made it a home, a place of passionate attachment, was not the cold contrivance of shared rights but the people’s preexisting ethnic characteristics: their language, religion, customs,

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86. Habermas, *supra* note 60, at 18.

87. Habermas, *supra* note 60, at 18.

88. Habermas, *supra* note 60, at 17.

89. Mitchell Stephens, *The Theologian of Talk*, L.A. TIMES MAG., October 23, 1994, at 26, 30. The title of the article was taken from Stanley Fish’s ironic description of Habermas’s “theory of communicative ethics” quoted in the article: “It’s the liberal answer to everything. Let’s talk it to death. Habermas preaches the theology of talk—the elevation of philosophy department seminars to a mode of public life.” *Id.* at 44.

Habermas’s “theology of talk” suggests his own description of the cognitive form of modernity: what he has called the “linguification of the sacred.” See 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION § V.3 (1987). Indeed, it would not be an overstatement to characterize Habermas’s own theory of communicative ethics as a utopian sacralization of the linguistic.

90. IGNATIEFF, *supra* note 23. Ignatieff’s study also served as the basis for a BBC television series.

and traditions. The nation as *Volk* began its long and troubling career in European thought.<sup>91</sup>

For Ignatieff, “civic nationalism,” on the other hand, is the very embodiment of the Enlightenment ideal which “maintains that the nation should be composed of all those—regardless of race, color, creed, gender, language, or ethnicity—who subscribe to the nation’s political creed.”<sup>92</sup> Like Habermas’s “nation of citizens,” Ignatieff’s “civic nationalism” is constituted not by shared ways of knowing sedimented through a living community of language, history, and culture, but rather by a uniformity of political procedures and practices. It is, he says, “called civic because it envisages the nation as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values.”<sup>93</sup> Under this view, by “subscribing to a set of democratic procedures and values individuals can reconcile their right to shape their own lives with their need to belong to a community.”<sup>94</sup> And, much as Habermas has imagined the modern state, according to Ignatieff’s “civic nationalism,” what “holds a society together is not common roots but law . . . [which] in turn assumes that national belonging can be a form of rational attachment.”<sup>95</sup> Here we see once again that the modern liberal vision of the legitimacy of the legal order establishes itself on an opposition that situates the putative cognitive universality of law and reason on one side and the lived particularity of culture or ethnicity on the other.<sup>96</sup> Indeed, the cosmopolitan universality of law’s reason is precisely what keeps at bay the unreasoning romantic attachments of “ethnic nationalism,” whose dangers Ignatieff so vividly portrays.

Much as Ernest Gellner has mocked the Marxian “Wrong Address” view of nationalism, he is no less impatient with what he calls the “Dark Gods” explanation of it. This “Dark Gods Theory,” encountered in Habermas’s and other contemporary liberal theorists of modernity, views “ethnic nationalism” as a quasi-volcanic eruption of a repressed primitive drive. This view assumes a stage-theory of socio-political development that, much like the Freudian model of personality formation, represents “ethnic nationalism” as a regression to some earlier, more primitive, vestigial, or even infantile, stage. Ethno-nationalism is envisioned rather like an expression of the nation-state’s unbridled “id.” Popular commentaries on contemporary ethnic conflicts constantly portray nationalist consciousness in these terms, as a re-emergence of repressed primitive passions that normally lie seething not far below the polished veneer of modern civil society.

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91. IGNATIEFF, *supra* note 23, at 7.

92. IGNATIEFF, *supra* note 23, at 6.

93. IGNATIEFF, *supra* note 23, at 6.

94. IGNATIEFF, *supra* note 23, at 7.

95. IGNATIEFF, *supra* note 23, at 7.

96. Ignatieff notes that in eighteenth century Great Britain, “some elements of this [civic] ideal were first achieved.” “But,” he argues, apparently quite without irony, “it was not until the French and American revolutions, and the creation of the French and American republics, that civic nationalism set out to conquer the world.” IGNATIEFF, *supra* note 23, at 6.

· But nationalism cannot be explained, Gellner says flatly, as a “re-emergence of the atavistic forces of blood or territory.”<sup>97</sup> Indeed, the great lesson of the recent scholarship on nationalism is that it cannot be understood—or ideologically contained—as Habermas and many other modernists would like to do. It is far from a simple regression to a Hobbesian state-of-nature, or to a pre-modern condition governed by vestigial, brutish, instincts. As Judt tells us, it is not merely a “pathological condition of incomplete modernity.”<sup>98</sup> Contemporary nationalist consciousness is not just a resurgence of some submerged stratum or dark primal urge as liberals would like to imagine any more than it can be understood as simply a mistake, a wrong turn, or a momentary detour from the high road of reason unfolding through history, as many orthodox Marxists have proposed.

“None of these theories,” Gellner says flatly, “is remotely tenable.”<sup>99</sup> In much the same vein, Judt argues persuasively that the Enlightenment tendency to treat “nationalism in all its forms as a historical mistake, a cognitive error to be made good by clear-sighted analytical demystification,” is empirically unsupportable. This approach fails to take nationalism and the persistence of national consciousness seriously on their own terms and thereby allows these phenomena to elude any adequate understanding.<sup>100</sup> The lesson of the recent flourishing of scholarship on nationalism is that virtually all social thought in the Enlightenment tradition—both liberal and Marxist—has missed the implication that recurrent assertions of particularist identities are in fact a corollary of the organization of knowledge and the logic of the social order under the modern nation-state. “Communities,” says Anderson, “are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined.”<sup>101</sup>

## VI. THE NATION-STATE AS REGIME OF KNOWLEDGE, A MODERN MODE OF IMAGINING

For Benedict Anderson, as we have seen, the nation is “a community imagined through language.”<sup>102</sup> Eric Hobsbawm has observed that “the very process of . . . modernization . . . implie[s] a homogenization and standardization of . . . inhabitants, essentially by means of a written ‘national language.’”<sup>103</sup>

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97. GELLNER, *supra* note 72, at 130.

98. Judt, *supra* note 26, at 44.

99. GELLNER, *supra* note 72, at 130.

100. Judt, *supra* note 26, at 45.

101. ANDERSON, *supra* note 1, at 6.

102. ANDERSON, *supra* note 1, at 146. Taking Switzerland as an example, Benedict Anderson notes that religion gave way to language as the index of identity after Europe was swept by the wave of liberal revolutions of 1848. ANDERSON, *supra* note 1, at 138.

103. HOBSBAWM, *supra* note 76, at 93. Max Weber argues that:

[I]n the main, it has been the work of *jurists* to give birth to the modern Occidental ‘state’ . . . [through] the triumph of *formalistic juristic rationalism*. . . . Bureaucratic rule . . . is not the only variety of legal authority, but it is the purest. . . . [It] is fixed by *rationally established norms*, by enactments, decrees, and regulations, in such a manner that the legitimacy of the authority becomes the legality of the general rule, which is purposely thought out, enacted, and announced with formal correctness.

Yet, language alone cannot serve as a nucleus for the development of national consciousness—for what Anderson calls the new “state-mind,” its “mode of imagining.”<sup>104</sup> Gellner describes how the modern “*esprit d’analyse*” effectively homogenizes all forms of discourse, just as the modernization of language seeks to normalize all local or social non-standard dialects to the national standard.<sup>105</sup> Thus, this “social construct” that is modern nationalism in fact emerges, crucially, as a constructed uniformity or a regimented homogeneity at the level of cognition, culture, and discourse.

This fact is something of a scandal for modern nationalists, both civic and ethnic, for as Gellner argues, a “basic deception and self-deception [is] practiced by nationalism.” For nationalism, Gellner says, takes power most characteristically

in the name of a putative folk culture . . . [whose] symbolism is drawn from the healthy, pristine, vigorous life of the peasants . . . Yet, in fact, nationalism is, essentially, the general imposition of a high culture on society . . . It means that generalized diffusion of a school-mediated, academy-supervised idiom, codified for the requirements of reasonably precise bureaucratic and technological communication. It is the establishment of an anonymous, impersonal society, with mutually substitutable atomized individuals, held together above all by a shared culture of this kind, in place of a previous complex structure of local groups, sustained by folk cultures reproduced locally.<sup>106</sup>

The implication of Gellner’s analysis is that the entire grand narrative of modernization—especially the canonical version of it associated with Max Weber’s emphasis on the progress of formal rationality as a condition of possibility of the modern nation-state—requires a faith that one can know, in Gellner’s words:

the human mind in general: namely, a common measure of fact, a universal conceptual currency, so to speak, for the general characterization of things . . . . Each of these elements is presupposed by rationality . . . as the secret of the modern spirit. By the common or single conceptual currency I mean that all facts are located within a single continuous logical space, that statements

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FROM MAX WEBER: ESSAYS IN SOCIOLOGY 299 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

104. ANDERSON, *supra* note 1, at 166.

105. Whether one is distinguishing between different “dialects” or between different “languages” is a longstanding question in sociolinguistics. For example, Norwegian and Danish are both considered distinct “languages,” although they are for the most part mutually intelligible, whereas spoken Cantonese and Mandarin are both called “dialects” of the Chinese language, although they are not.

The difference lies in whether a particular style or register of speech is the official idiom of a state—whether it is a “national language.” The linguist Max Weinreich is said to have remarked that a language is simply a dialect with an army and a navy. THOMAS PAIKEDAY, THE NATIVE SPEAKER IS DEAD 26 (1985). See generally JOHN EARL JOSEPH, ELOQUENCE AND POWER: THE RISE OF LANGUAGE STANDARDS AND STANDARD LANGUAGES (1987).

The relevance of this point for the present discussion is that if, as Anderson argues, a nation is a “cultural artifact of a particular kind,” that is, “a community imagined through language,” the status of any language is itself no less a “cultural artifact,” and no less “imagined.” See ANDERSON, *supra* note 1, at 146.

106. GELLNER, *supra* note 72, at 57.

reporting them can be conjoined and generally related to each other, and so that in principle one single language describes the world and is internally unitary . . . [In modern] society it is assumed that all referential uses of language ultimately refer to one coherent world, and can be reduced to a unitary idiom.<sup>107</sup>

According to Anderson, it was the seventeenth and eighteenth century development of what he calls “print-capitalism”<sup>108</sup>—the technology of the printing and distribution of books and newspapers and the development of mass markets or “publics”—that provided “a new way of linking fraternity, power, and time meaningfully together . . . [and] made it possible for rapidly growing numbers of people to think about themselves, and to relate themselves to others, in profoundly new ways.”<sup>109</sup> Anderson argues persuasively that this new medium for the social distribution of cognition “created the possibility of a new form of imagined community, which in its basic morphology set the stage for the modern nation.”<sup>110</sup>

Anderson observes that this “new form of imagined community,” the nation, “is always conceived as a deep, horizontal comradeship.”<sup>111</sup> “Ultimately,” he says, “it is this fraternity that [has made] it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings” as the nation-state offers.<sup>112</sup> Mary Louise Pratt, drawing our attention to the gendered-ness of Anderson’s term “fraternity,” notes that as his “image suggests, the nation-community is embodied metonymically in the finite, sovereign, fraternal person of the citizen soldier.”<sup>113</sup>

The process of “socially constructing” a modern nation-state, then, is carried out through the establishment of a national language and a national high culture. The nation state is, before anything else, a new, modern regime of knowledge. It comes into being through a nationalistic regimentation and normalization of the cognitive, discursive, and cultural aspects of the “sovereign, fraternal” identity of the new citizen-subject.

The title of Lawrence Friedman’s recent book, *The Republic of Choice*, nicely captures the essentially individualist and voluntarist ideology that undergirds modern legal

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107. GELLNER, *supra* note 72, at 21. *See also* GOLDBERG, *supra* note 19.

108. ANDERSON, *supra* note 1, at 46.

109. ANDERSON, *supra* note 1, at 36.

110. ANDERSON, *supra* note 1, at 46. *See also* JACK GOODY, THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY (1986); PERSPECTIVES ON SOCIALLY SHARED COGNITION (Lauren B. Resnick et al. eds., 1991).

111. ANDERSON, *supra* note 1, at 7.

112. ANDERSON, *supra* note 1, at 7.

113. Mary Louise Pratt, *Linguistic Utopias*, in THE LINGUISTICS OF WRITING: ARGUMENTS BETWEEN LANGUAGE AND LITERATURE 49 (Derek Attridge et al. eds., 1989).

In their discussions of the linguistic dimension of the modern state, Anderson and Pratt bring to view precisely this normalization of subjectivity, this homogenization of the cognitive identity of the newly imagined citizen-subject. Pratt ironically observes of Jürgen Habermas’s effort to locate a principle for democracy in a universal pragmatics of communicative action that “the only sure sign of a non-hierarchical society would be complete linguistic homogeneity.” *Id.* at 59-60.

culture's understanding of the source of its own legitimacy.<sup>114</sup> A mobile modern society, Friedman observes,

is in a curious way unified within its complexity. . . . [Modern] nationalism tries to level out cultural diversity and ethnic pluralism. . . . [Individual mobility] broke up old ethnic enclaves; . . . [it] led to a massive *legal* uniformity. This is no paradox. In democratic republics law centers on individuals rather than on groups. The individual is the *unit* of modern mobility. It is the individual, not the people or the tribe, who wanders through the republic of choice.<sup>115</sup>

"Tribes," then, are not just local enclaves of ethno-national identity. Rather, the lesson is that, under the modern nation-state, the tribe is one form of *residual* minority or subaltern identity, one that has lost the struggle to set the terms of its own mode of knowing. As Gellner remarks on the relation between nationalism and tribalism as alternative regimes of knowledge:

[N]ationalisms are simply those tribalisms . . . which through luck, effort or circumstance succeed in becoming an effective force under modern circumstances. They are only identifiable *ex post factum*. Tribalism never prospers, for when it does, everyone will respect it as a true nationalism, and no one will dare call it tribalism.<sup>116</sup>

## VII. IDENTITY CATEGORIES AND THE MANAGEMENT OF HETEROGENEITY

As we have seen, the standard account of state formation locates the origins of the modern nation-state model in the rising identity consciousness of ethno-national movements in early modern Western Europe.<sup>117</sup> And, as the story goes, it was from Europe's Atlantic shores that the ideal-type of the nation-state was subsequently exported

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114. FRIEDMAN, *supra* note 64. Friedman identifies this key notion of individual choice with a modern ethic of personal independence and mobility in a way that demonstrates the continuing reliance of Western legal culture on the sort of "status to contract" modernization story first formulated in the mid-nineteenth century.

115. FRIEDMAN, *supra* note 64, at 152. It is relevant to the point of this discussion that Friedman has identified the privileging of the "individual" over the "tribe" as the unit of modern social life as one distinguishing mark of the modern socio-legal order and that he has linked this fact to the leveling effects of modern nationalism on cultural diversity and ethnic pluralism.

As Friedman observes, modern "social theorists and thinkers tend to draw a picture of primitive or ancient man as a prisoner of status, locked in the iron cage of custom, and unable, except in rare instances, to break free of this cage." Or, at least this was the classical view, for, as Friedman says, "Social theorists in this century tend to have a gloomier view; the confident exuberance is gone. . . . Victorian exuberance is hard to maintain in the era of Auschwitz." He suggests that it "is likely that social theory simply stumbles along behind changes in human consciousness, which are themselves the product of profound changes in the social and physical environment of human beings." FRIEDMAN, *supra* note 64, at 23-25.

116. GELLNER, *supra* note 72, at 87.

117. According to a common version of this story, it was first in Spain (with the unification effected by Ferdinand and Isabella, and the expulsion of the Jews and the Moors), then in Great Britain and France (as they pacified their own internal tribes: the Welsh, Scots, Bretons, Basques, etc.) that the nation-state model of a unitary cultural and political identity assumed its now-canonical form.

both eastward across Europe and Asia and westward across the Atlantic to the New World.

One of the most original aspects of Benedict Anderson's account of the origin and spread of nationalism is that he turns this standard story of the origin of the nation-state model on its head. He argues that modern nationalism had its beginnings in the eighteenth and early nineteenth century fragmentation of the European empires in the New World. Anderson suggests that the new model arose when the "creoles"—the population of, as he says, "(at least theoretically) pure European descent but born in the Americas"<sup>118</sup>—sought to differentiate themselves on the one hand "from their respective imperial metropoles"<sup>119</sup> and on the other from the unassimilated, non-white indigenous and slave populations. The creoles accomplished this by achieving a historical convergence of a secularized national culture with the bureaucratic structure they had inherited from the colonial administration.

Studying the history of Western legal thought, Peter Fitzpatrick has arrived at a similar conclusion. He argues against the prevailing modernist liberal view that regards European imperial expansion as a "pathology" that was fundamentally at odds with the Enlightenment ideology of "the universal rights of man." In Fitzpatrick's words, "imperialism [was in fact] characteristic of the Enlightenment experience," and the "experience of imperialism . . . [was] central and enduring in the making of modern law."<sup>120</sup> Like Anderson, he maintains that the identity that early modern Europeans imagined for themselves, "as the bearers of universal Enlightenment," was an "identity constituted in opposition to the savages and barbarians without."<sup>121</sup> "Racism was," says Fitzpatrick, "in short, basic to the creation of liberalism and the identity of the European."<sup>122</sup>

In Anthony Carty's view, "[i]t is a simple historical fact that the Enlightenment created Civilization which in turn created the 'Primitive.'"<sup>123</sup> As Carty observes:

Within the civilisation of the Enlightenment, the limits of the legal order were defined in terms of the boundaries of civilised nations. Yet these same limits rested upon the uncivilised and the primitive as a shadow, engaged in a compulsive and obsessive contradiction of suppression and incorporation. Beyond the obvious economic subordination of the non-Western world, this meant the creation of native identities in a dialectic of opposition to the civilised European. However, rebellious natives are to be seen as not merely constituted by imperialism, but as part of an inevitable series of oppositions which grow up integrally with the Enlightenment project, as its shadow side, along with nature, gender and whatever other concrete particularity can appear to threaten the "free" individual.<sup>123</sup>

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118. ANDERSON, *supra* note 1, at 47.

119. ANDERSON, *supra* note 1, at 47.

120. Fitzpatrick, *supra* note 32, at 90, 96.

121. Fitzpatrick, *supra* note 32, at 98.

122. Fitzpatrick, *supra* note 32, at 97.

123. Anthony Carty, *Introduction: Post-Modern Law*, in POST-MODERN LAW, *supra* note 32, at 23.

Anderson observes that these native identities were created by the “mode of imagining of the colonial state.”<sup>124</sup> In particular, he highlights the “identity categories”<sup>125</sup> that were employed in colonial censuses and in related technologies of population management. Anderson says:

The new demographic topography put down deep social and institutional roots as the colonial state multiplied its size and functions. Guided by its imagined map it organized the new educational, juridical, public-health, police, and immigration bureaucracies it was building on the principle of ethno-racial hierarchies. . . . The flow of subject populations through the mesh of [these institutions] created “traffic-habits” which in time gave real social life to the state’s earlier fantasies.<sup>126</sup>

In the United States, no less than in other settler societies formed through the processes of European colonization and emigration, the “ethno-racial” categories and hierarchies of the colonial era have endured to influence the contemporary social order. The explicit restriction of the franchise to free white males in the early republic was gradually “diversified” to other categories. The Jim Crow system of *de jure* segregation established in the late nineteenth century in the former slave-holding states relied, of course, upon explicit legal categories of racial identity.<sup>127</sup>

A similar arbitrariness and spurious precision characterizes the criteria the BIA uses to define the category “Indian tribe.” In a recent *Los Angeles Times* interview, the deputy director of the BIA in California, Michael R. Smith, acknowledged that many legally recognized tribes, especially in California, are “political—not racial—entities.” These entities, says Smith, “were created by Congress . . . [which] created a land base for them and said ‘You’re a tribe.’”<sup>128</sup>

## CONCLUSION

One often hears it said of Native communities that they refuse to enter the modern world. It would be more accurate to observe that it is the “modern world’s” vision of itself that cannot admit Native peoples in their particularity. As James Clifford remarks,

The institution of tribe, still trailing clouds of aboriginal sovereignty and reminiscent of its eighteenth-century synonym *nation*, is less easily integrated into the modern multiethnic, multiracial state. The resurgent cultural-political identity asserted by Indian tribes is more subversive than that of Irish-Americans

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124. ANDERSON, *supra* note 1, at 166.

125. ANDERSON, *supra* note 1, at 164.

126. ANDERSON, *supra* note 1, at 169.

127. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). The celebrated phrase from footnote four of *United States v. Carolene Products Co.* which spoke of “prejudice against discrete and insular minorities” provided the conceptual framework for the legal construction of collective identities in the period after the Second World War. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938). See also ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

128. Duane Noriyuki, *Nation of One*, L.A. TIMES, November 14, 1994, at E1, E4.

or Italian-Americans: Native Americans claim to be both full citizens of the United States *and* radically outside it.<sup>129</sup>

The federal standards of recognition for Indian tribes serve not as a gateway to the recognition of Native American peoples right to self-determination. Rather they form a bureaucratic process that hinders recognition by placing enormous burdens of proof upon the petitioning Native community, burdens which require these communities to demonstrate that they fit a definition of their own identity constructed of European stereotypes of race, tribe, and nation. The federal recognition standards thereby function as a filter that effectively taxes Native groups for their resolute particularity and in fact works to exclude numerous "extant and functioning tribes."<sup>130</sup>

The recognition process exemplifies the sort of contest to control the semantics of a population's identity which has become a central political question in the late-modern state. This sort of process effectively grants or withholds socio-political recognition of identity. This process—a process which operates at the level of category definition and redefinition, allotting or denying, shaping, extending, or restricting the social space accorded to specific forms of collective subjectivity—determines whether a population's social identity is normal or deviant, central or marginal.

A number of scholars, most notably Michael Omi and Howard Winant, have argued that the Civil Rights movement of the 1950s and 1960s (along with allied "cultural nationalist" currents such as the Black Consciousness, *Negritude*, and Third World movements) had its "greatest triumphs, its most permanent successes . . . in its ability to create new racial 'subjects' . . . . [It] *redefined the meaning of racial identity . . . in American society.*"<sup>131</sup> As Omi and Winant continue,

Social movements create collective identity by offering their adherents a different view of themselves and their world; different, that is, from the worldview and self-concepts offered by the established social order. They do this by the process of *rearticulation*, which produces new subjectivity by making use of information and knowledge already present in the subject's mind. They take elements and themes of his/her culture and infuse them with new meaning.<sup>132</sup>

Omi and Winant maintain that it was on this basis that the Civil Rights Movement "could rearticulate black collective subjectivity."<sup>133</sup>

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129. CLIFFORD, *supra* note 20, at 339.

130. Paschal, *supra* note 7, at 209.

131. OMI & WINANT, *supra* note 18, at 99 (italics in original).

132. OMI & WINANT, *supra* note 18, at 99.

133. OMI & WINANT, *supra* note 18, at 99. Elsewhere, Patricia Williams and I have criticized the way in which later commentators have sought to portray Martin Luther King, Jr. and other strategists of the Civil Rights movement as essentially concerned with individual liberation. Much like Omi and Winant, we argue that there has been an effort to ignore the fundamental question of collective identity, to elide the sense in which the struggle of the 1950s and 60s was a "fight to expand the social space of all blacks and to re-articulate the political semantics of the collective identity of the descendants of the slaves." Perry & Williams, *supra* note 18, at 229.

From this perspective, the very framing of the current controversy in terms of “identity politics,” “essentialism,” “victimhood,” and “status claims,” stigmatizes deviation from unacknowledged standards, marginalizes recalcitrant particularisms, and works ultimately to manage entire populations through the normalization of collective subjectivities. To frame the controversy in this way is to refuse to acknowledge the extent to which identity formations are both constituted by legal and bureaucratic processes of government and, once so constituted, are deployed in the contests over the meaning of these identities.

“Nationalisms,” Gellner suggests, are simply tribalisms that have carried the day.<sup>134</sup> Modern civic nationalism and the notions of civic identity that inform it rest upon the historical triumph of a particular cultural identity no less ethnic nor tribal than those it condemns. But it enacts a triumph so complete that its identity becomes constitutive of a new regime of knowledge, a new “mode of imagining”—a triumph so complete that its ethnic dimension can henceforth pass as universal. And it is then from this position of “universalized” identity that the particularity of any other tribe can be made to appear as a “pathology of incomplete modernity” rather than, as Professor Starr argues more accurately, “products of particular times, places, and events.”<sup>135</sup>

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134. See text accompanying *supra* note 107.

135. See *supra* text accompanying note 2.

# NEW SKIN, OLD WINE: (EN)GAGING NATIONALISM, TRADITIONALISM, AND GENDER RELATIONS

L. AMEDE OBIORA\*

This Article ascertains a range of variables and influences that make for the selective rendering of history and the manipulative reification of culture for nationalistic purposes. While the bulk of the perspective articulated in this Article is informed by an African experience, it draws on other contexts as well. With particular reference to the Igbos of South-Eastern Nigeria, this Article chronicles the gender-biased renegotiation of some incidents of marriage dissolution to demonstrate that taken-for-granted cultural traditions are, oftentimes, organic historical artifacts inherent in certain social conditions. Locating specific cultural formations in the colonial moment, this Article argues that their affirmation and appropriation is inconsistent with the spirit and politics of “nationalism.”

This argument proceeds in four segments. Part One is a theoretical framework that establishes and evaluates the origins, purposes, and limitations of nationalism. Part Two discusses the double bind implicit in trumping and short-changing feminist platforms under the guise of nationalism. Part Three illuminates the tortuous trajectory and instrumentality of the extant mélange known as “customary law.” This Part also challenges the celebration of customary law as the quintessence of an ancestral past. Part Four brings the objective realities of women at the dissolution of marriage by divorce or death to bear on the discussion of the tensions and contradictions between “nationalism” and certain categories of “cultural traditions.” This final Part demonstrates that, regardless of the convoluted history and dynamics of gender relations in Africa, most African nationalist regimes foist the subordinate status of women as a customary given. On this premise, this Article argues that the failure to problematize the representation of indigenous mechanisms that regulate gender relations and the structural and ideological factors that reconstitute and constrain women’s options over time places these regimes on a continuum with the colonial predecessors they once deprecated.

## I. ENGENDERING COLLECTIVE CONSCIOUSNESS, IMAGINING CONTINUITIES

Generally speaking, nationalist ideology suffers from pervasive false consciousness. Its myths invert reality . . . It preaches and defends continuity, but owes everything to a decisive and unutterably profound break in human history.

Ernest Gellner<sup>1</sup>

[W]e can bring to bear on narratives of nationalism the critical and theoretical insights of analyses of literary narratives . . . We would do well from this perspective to pay attention to the “narrative voice(s)” who speak these stories, their constructions of time and space, and their postulations of narrative telos.

Mary Layoun<sup>2</sup>

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1. ERNEST GELLNER, *NATIONS AND NATIONALISM* 124-25 (1983).

2. Mary Layoun, *Telling Spaces: Palestinian Women and the Engendering of National Narratives*,

Researchers have demonstrated that nationalism is the outcome of processes in history produced and elaborated where particular conjectures of relations, contingencies, and events in everyday practice render it meaningful.<sup>3</sup> Situated at the point where politics, technology, and social transformation intersect, nationalism emerges as a traditionalistic antidote to the deracination of familiar origins. As such, it purports to provide an alternative for systemic and relational integrity, security, and equilibrium.<sup>4</sup> More precisely, an important aim of nationalist ideology is to orchestrate a potential for wholeness that transcends the estrangement and rupture between individual and society precipitated by antecedent material conditions.<sup>5</sup> Since the imputation of continuity with the past is germane to this end, the nationalist discourse strategically reinterprets and reifies intrinsically organic cultural and historical narratives as though they are autonomous constants rooted in the remotest antiquity.<sup>6</sup> The politicized past that encapsulates a demagogic “vision of reality through a prism of illusion” becomes a rallying point for political legitimization and mobilization.<sup>7</sup>

Ordinarily, if nationalism prospers, it enacts a mode of cultural engineering that, instead of replicating local low culture, attenuates a mosaic of cultural heterogeneity and replaces alien high culture with a local high (literate, specialist-transmitted) culture.<sup>8</sup> Sub-Saharan Africa—where the use of an alien, Eurocentric high culture survived nationalist claims and struggles—exemplifies an exception to this proposition.<sup>9</sup> In this region, in spite of animated rhetoric and iconoclasm against European colonialism, the philosophy underlying the quest for national culture and identity promoted synthesizing the vitality of mingled continuity and innovation to pick out what is best from European culture and dilute it with an indigenous essence.<sup>10</sup>

It is paradoxical that the relevant nationalist elites ultimately aligned with and ratified the self-same alien dispensation whose radical opposition was the impetus and the articulated *raison d'être* for their struggles. This paradox speaks of an aspect of the

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in NATIONALISMS & SEXUALITIES 407, 413 (Andrew Parker et al. eds., 1992) [hereinafter NATIONALISMS & SEXUALITIES].

3. See BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983); ERIC J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH AND REALITY 10 (1990); GELLNER, *supra* note 1, at 125; Richard G. Fox, *Introduction*, in NATIONALIST IDEOLOGIES AND THE PRODUCTION OF NATIONAL CULTURES 6 (Richard G. Fox ed., 1990) [hereinafter NATIONALIST IDEOLOGIES]; Liisa Malkki, *Context and Consciousness: Local Conditions for the Production of Historical and National Thought among Hutu Refugees in Tanzania*, in NATIONALIST IDEOLOGIES, *supra*, at 32, 54.

4. See HOBSBAWM, *supra* note 3, at 10; GELLNER, *supra* note 1.

5. See HOBSBAWM, *supra* note 3, at 10; GELLNER, *supra* note 1.

6. See THOMAS HYLLAND ERIKSEN, ETHNICITY AND NATIONALISM: ANTHROPOLOGICAL PERSPECTIVES 73 (1993); RICHARD HANDLER, NATIONALISM AND THE POLITICS OF CULTURE IN QUEBEC 27 (1988).

7. GELLNER, *supra* note 1, at 58.

8. See GELLNER, *supra* note 1, at 57; HOBSBAWM, *supra* note 3, at 92. See also Simon Roberts, *Introduction: Some Notes on “African Customary Law,”* 28 J. AFR. L. 1, 3 (1984).

9. See GELLNER, *supra* note 1, at 81.

10. JOHN ILIFFE, A MODERN HISTORY OF TANGANYIKA 327 (1979).

contradictions of nationalism, both as a phenomenon and as an ideology. These contradictions cumulatively signify a Janus-facedness that betrays the inner realities of nationalism.<sup>11</sup> The element of the contradiction that is most apposite for our immediate purposes lies in this fact: In principle, nationalism purports to counter imperialist depredations by fostering a wholesale return to ostensibly ancestral traditions and values; in reality, it routinely deploys bounded cultural objects and imperialist stereotypes that are demonstrably discrepant and dissonant with the specificities of historical experiences.<sup>12</sup> The centrality of this element derives from its bearing on gender relations as a paradigm of the contradictions of nationalism.

## II. BREACHED MANIFESTOES, CRISES OF CONFIDENCE: IMPLICATIONS FOR WOMEN

Seek the political kingdom and all will be added to you.

Kwame Nkrumah<sup>13</sup>

It is difficult to start a revolution, more difficult to sustain it. But it's later, when we've won, that the real difficulties will begin.

The Battle of Algiers<sup>14</sup>

[I]n various parts of the "Third [W]orld," the struggle for women's emancipation was expediently connected to an anti-colonial, nationalist struggle. After Independence was won, militant women found themselves, typically, back in "normal" subordinate roles and came to recognize the dangers of conflating national liberation with women's liberation.

Ketu H. Katrak<sup>15</sup>

The study of gender relations affords a framework within which to examine the dilemma and dissonance between the propaganda and the practices of nationalism. According to nationalist ideology, the preeminent criteria for exclusion and inclusion from the structures and institutions of society is determined by the boundaries of the nation.<sup>16</sup> Given the historical conditions of its origin, the dictates of efficient nationalist resistance enjoin the consolidation of disparate currents in the body politic. Consequently, it is not unusual for perceived fractures and counter-politics to be censored and victimized as treacherous of the compelling irredentist agenda. This strategy of containment often translates into an atmosphere of coerced or studied cooperation for some persons with a different plan of action.

11. See BASIL DAVIDSON, *THE BLACK MAN'S BURDEN* (1992). Compare R. Radhakrishnan, *Nationalism, Gender, and the Narrative of Identity*, in *NATIONALISMS & SEXUALITIES*, *supra* note 2, at 77, 84 and *NATION AND NARRATION* (Homi K. Bhabha ed., 1990).

12. See Rhonda Cobham, *Misgendering the Nation: African Nationalist Fictions and Nuruddin Farah's Maps*, in *NATIONALISMS & SEXUALITIES*, *supra* note 2, at 42, 44.

13. Quoted in DAVIDSON, *supra* note 11.

14. THE BATTLE OF ALGIERS (Antonio Musu, Igor Films of Rome, Stella Productions 1988).

15. Ketu H. Katrak, *Indian Nationalism, Gandhian "Satyagraha," and Representations of Female Sexuality*, in *NATIONALISM & SEXUALITIES*, *supra* note 2, at 395, 395.

16. ERIKSEN, *supra* note 6, at 102.

Besides the conflation of causes, the exigency and frenzy of the fight against “the enemy from the outside” tends to preclude meaningful consideration of the credentials or potentialities of nationalism.<sup>17</sup> The tried and proven lessons of international history reveal, however, that, in the final analysis, the pragmatic exaltation of the nationalist agenda over competing subaltern politics becomes taken at face value, perpetuating arbitrary exclusions in nascent nation-states. Contestable assumptions and mythical claims are uncritically integrated into the newly established material and ideological order, often settling the equation in favor of the elite. The resultant inequality, appallingly reminiscent of the condition it emerged to palliate, lends credence to the designation of nationalism as a perversity that demands freedom with one hand and denies it with the other.<sup>18</sup>

On a number of occasions, women have been known to repress protests against what could validly qualify as gender-based internal colonialism to avoid “giving fuel to the enemies” of the noble cause of political self-determination.<sup>19</sup> As the following discussion will show, the relative silence and invisibility of women is also attributable to the gravitation of the colonial administration to men.<sup>20</sup> Some nationalists strategically exploit this colonial discontent to coopt gender-specific struggles and discourses. Despite assurances that self-governance would be prophylactic of gender-related inequities, however, nationalism typically fulfills itself as a bastion of patriarchal aspirations, authority, and privilege.<sup>21</sup> A rude awakening comes for women when feminist interests and discontents, which were muted and deferred for the benefit of the nationalist agenda, persist unentertained and unremedied, irrespective of independence.<sup>22</sup>

With the travails of sociopolitical dis-ease, everyday events, processes, and relationships are spontaneously interpreted by evoking a putative past of pristine purity as a kind of moral blueprint.<sup>23</sup> In the bid to reclaim this perceived past, nationalist elites seldom pause to acknowledge or address discernible conflicts, tensions, and lacunae. They conceive and pursue programs that are rarely adapted to the complexities of the

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17. See DAVIDSON, *supra* note 11, at 163; NATION AND NARRATION, *supra* note 11, at 3.

18. See DAVIDSON, *supra* note 11, at 18.

19. See Marie-Aimée Hélie-Lucas, *Bound and Gagged by the Family Code*, in 2 THIRD WORLD—SECOND SEX 14 (Miranda Davies ed., 1987). A recent illustration of this hierarchization of priorities is offered by the African National Congresswomen’s statement, “It would be suicidal for us to adopt feminist ideas. Our enemy is the system and we cannot exhaust our energies on women’s issues.” Anne McClintock, *No Longer a Future Heaven: Women and Nationalism in South Africa*, 51 TRANSITION 104, 118 (1991) (quoting STATEMENT OF DELEGATION TO THE NAIROBI CONFERENCE ON WOMEN (1985)).

20. See L. Amédé Obiora, *Reconsidering African Customary Law*, 17 LEGAL STUD. F. 217 (1993).

21. See McClintock, *supra* note 19, at 122.

22. The overwhelming male cast, gendered power-base, and sexist implications of nationalist regimes has been discussed and referenced in other forums. See Hélie-Lucas, *supra* note 19, at 14 (“I will certainly admit that Western right wing forces may and will use our protests, especially if they remain isolated. But it is as true to say that our rightist forces exploited our silence.”). See also Gayatri Chakravorty Spivak, *Woman in Difference: Mahasweta Devi’s “Douloti the Bountiful,”* in NATIONALISMS & SEXUALITIES, *supra* note 2, at 96, 97; McClintock, *supra* note 19, at 122.

23. Cf. Malkki, *supra* note 3, at 37.

social categories and roles of gender.<sup>24</sup> In this scheme, masculinity is idealized as the foundation of the nation and society, and the home is reified as a sacrosanct sanctuary from the profanities of the material world.<sup>25</sup> By the logic of this scheme, women, of course, take center stage in the cult of domesticity.<sup>26</sup> Defined as the guardians of morality and traditional order, women are scape-goated, and simultaneously targeted as regenerative ducts, for most of the malaise inherent in societal shifts and disintegrations.<sup>27</sup> Moral turpitude is asserted and accentuated as a symptom of anomie to externalize disorder or to feign alienation from a more "natural" definition of self and to usher in animated (re)definitions of gender roles to control female sexuality.<sup>28</sup>

Several attempts have been made to locate national culture as a function of struggles and asymmetric relations and structures of power. Fox analyzes national culture as a process that evolves amidst contestations.<sup>29</sup> Williams elaborates on the issue by explaining that when culture is objectified as tradition, social emphasis shifts from neutral interpretations of human biogenetic capabilities and ecological constraints to a struggle to control the configuration of meanings and their practical implications for resource distribution.<sup>30</sup> An interesting dimension is introduced by Eriksen who sheds light on how ideologists always select and reinterpret those aspects of culture and history that legitimate a particular power constellation.<sup>31</sup>

These theories are analogous to Fanon's observation about national culture. According to Fanon, a national culture under colonial domination is an ultimately stratified and stratifying terrain shot through with centrifugal tendencies; under nationalism, national culture is a mummification of fragments which, because they are static, are in fact symbols of negation and outworn contrivance.<sup>32</sup> Concluding, Fanon insists that nationalism's ratification of spurious cultural constructs and its resuscitation of desuetude in the name of traditionalistic politics is an instrumental "throwback to the

24. See Keebet von Benda-Beckmann, *Development, Law, and Gender-Skewing*, 30/31 J. LEGAL PLURALISM 87 (1990-91); Els A. Baerends, *Woman is King, Man a Mere Child: Some Notes on the Socio-Legal Position of Women among Anufom in Northern Togo*, 30/31 J. LEGAL PLURALISM 33 (1990-91).

25. See GEORGE L. MOSSE, NATIONALISM AND SEXUALITY: RESPECTABILITY AND ABNORMAL SEXUALITY IN MODERN EUROPE 17, 18 (1985).

26. In the words of Radhakrishnan, "woman" becomes the mute but necessary allegorical ground for the transactions of nationalist history." Radhakrishnan, *supra* note 11, at 84. See also Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in RECASTING WOMEN: ESSAYS IN INDIAN COLONIAL HISTORY 233, 239 (Kumkum Sangari & Sudesh Vaid eds., 1989); MOSSE, *supra* note 25.

27. See Valentine Moghadam, *Revolution, Islam and Women: Sexual Politics in Iran and Afghanistan*, in NATIONALISMS & SEXUALITIES, *supra* note 2, at 424, 428; Carolyne Dennis, *Women and the State in Nigeria: The Case of the Federal Military Government (1984-85)* in H. AFSHARR, WOMEN, STATE AND IDEOLOGY 13 (1987).

28. In this setting, the "modern woman" becomes the deviant who symbolizes the perceived disappearance of the traditional docile and economically dependent woman. See Cobham, *supra* note 12, at 46.

29. Fox, *supra* note 3, at 6, 10.

30. Brackette F. Williams, *Nationalism, Traditionalism, and the Problem of Cultural Authenticity*, in NATIONALIST IDEOLOGIES, *supra* note 3, at 112, 127.

31. ERIKSEN, *supra* note 6, at 118.

32. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1966).

laws of inertia."<sup>33</sup> In keeping with these paradigms of tension and indeterminacy, it has been vigorously argued that the process of ascertaining the presumably immutable and reproducible core of national culture privileges and represents a staking out of a position by a particular constituency predominated by male elites and supported by the State.<sup>34</sup>

The preceding insights offer a point of entry for an examination of the transitions in gender roles and relations occasioned by the formalization of so-called African customary law in the wake of colonialism and nationalism. In the next Part, I investigate the contingencies that motivated and affected formalization, both as an instrument of colonial rule and as an instrument for the furtherance of nationalism. The Part falls into two subparts. The first focuses on the making of customary law in the colonial era and its alienating implications for pertinent constituencies. The second locates formalization as a function of nationalist flirtations with the false options of "tradition" and "modernity."

### III. RATIFYING AND CONGEALING ALIENATIONS: REFLECTIONS ON FORMULAIC TRADITIONS

#### A. *The "Evolution" of Customary Law*

The nationalism which produced the nation-states of newly independent Africa . . . was not a restoration of Africa to Africa's own history, but the onset of a new period of indirect subjection to the history of Europe.

Basil Davidson<sup>35</sup>

Just because so much of what subjectively makes up the modern "nation" consists of [invented] constructs . . . , the national phenomenon cannot be adequately investigated without careful attention to the "invention of tradition."

Eric J. Hobsbawm<sup>36</sup>

Colonialism was an especially fluid era marked by transformative events.<sup>37</sup> Its political economy altered the cultural, social, and economic landscape of the encapsulated communities as well as the function, significance, and ideology of socio-legal axioms. For a variety of reasons—financial, political, and administrative—the British policy of colonial administration was one of indirect rule.<sup>38</sup> The political sensibilities of the policy meant that indigenous systems of law and authority were incorporated into the apparatus

33. *Id.* at 237.

34. See, e.g., Obiora, *supra* note 20; Elizabeth Isichei, *Myth, Gender and Society in Colonial Asaba*, 61 AFR. 513 (1991). For a dramatic illustration of the value and power of constructs such as "modernity" and "tradition," see DAVID WILLIAM COHEN & E.S. ATIENO ODHIAMBO, *BURYING S.M.: THE POLITICS OF KNOWLEDGE AND THE SOCIOLOGY OF POWER IN AFRICA* (1992).

35. DAVIDSON, *supra* note 11, at 10.

36. Eric J. Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1, 15 (Eric J. Hobsbawm & Terence Ranger eds., 1983) [hereinafter *INVENTION OF TRADITION*].

37. SALLY FALK MOORE, *SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980* (1986); Sally Falk Moore, *History and the Redefinition of Custom on Kilimanjaro*, in *HISTORY AND POWER IN THE STUDY OF LAW* 277, 278 (June Starr & Jane F. Collier eds., 1989).

38. Sara Berry, *Hegemony on a Shoe String* (unpublished manuscript, on file with the author) (cited in Obiora, *supra* note 20).

of the colonial system of governance.<sup>39</sup> A large portion of the day-to-day administration of justice was delegated to courts that were constituted to administer “native law and custom.”<sup>40</sup> In Southern Nigeria, as in many parts of Africa, a native court consisted of appointees, including non-natives, sitting with or without assessors.<sup>41</sup>

The native court was basically foreign in substance and process. Its procedures were informed by English legal traditions, and it was commonly presided by an English District Commissioner who rendered the ultimate ruling on the validity of a custom. In discharging this responsibility, the Commissioner was mandatorily required to recognize a rule of custom only if he found that it was not contrary to public policy, incompatible with existing statute, unreasonable, or repugnant to natural justice, equity, and good conscience.<sup>42</sup> This fiat franchised ethnocentrism as commissioners were notoriously prone to recognize customs that resonated with their situated and culturally-specific understandings.<sup>43</sup> The foreign-ness of the court prompted the then Chief Justice of Nigeria to remark, “the main and, to my mind, insuperable objection to the Southern Nigeria native courts is [that] they are not native courts at all.”<sup>44</sup>

The native courts ordinarily proceeded without critically evaluating the historical circumstances that may have interfered with any possibility for relative autonomy in the operation of customs.<sup>45</sup> In reality, however, the concomitant changes that attended Western contact exacerbated indeterminancies and created significant voids for which old ways were no longer available or viable, and legal discourses vacillated in keeping with the imperatives of disrupted conditions and patterns of life.<sup>46</sup> Notwithstanding this reality, customs regarding irrevocably altered institutions and practices were “established” and described as resting on immemorial traditions, as though they were changeless and unchanged.<sup>47</sup> Consequently, judicial procedures and transactions were set up to ignore the formative character of relevant cultural traditions and the degree to which they were constructs adapted for the management of massive social shifts and crises. The process also undermined the risk of opportunism and of embellishment emanating from the

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39. LAW IN COLONIAL AFRICA (Richard Roberts & Kristin Mann eds., 1990).

40. See TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (1956).

41. S.N. NWABARA, IGBOLAND: A CENTURY OF CONTACT WITH BRITAIN, 1860-1960 at 171 (1977); F. A. Ajayi, *The Future of Customary Law in Nigeria*, in AFRIKA INSTITUUT, THE FUTURE OF CUSTOMARY LAW IN AFRICA 42 (1956).

42. ANDREW EDWARD WILSON PARK, SOURCES OF NIGERIAN LAW (1963); AKINOLA AGUDA, THE LAW OF EVIDENCE IN NIGERIA 92, 98 (1974). Cf. Eastern Nigeria High Court Law, ch. 61, §§ 20(1), 22; Nigerian Evidence Act, § 14(3) (1958).

43. B. O. NWABUEZE, MACHINERY OF JUSTICE IN NIGERIA 70 (1963).

44. C. J. Speed, *Memorandum Submitted to the Governor*, in LUGARD, AMALGAMATION REPORT, 1912-18 cmd. 468; NWABUEZE, *supra* note 43, at 70.

45. ANTONY N. ALLOTT, THE LIMITS OF LAW 57 (1980).

46. See LAW IN COLONIAL AFRICA, *supra* note 39.

47. Martin Chanock, *Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia*, in AFRICAN WOMEN & THE LAW: HISTORICAL PERSPECTIVES 53, 57, 59 (Margaret Jean Hay & Marcia Wright eds., 1982); Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights*, in 3 L.H. GANN & PETER DINGMAN, COLONIALISM IN AFRICA, 1870-1960 at 221 (Victor Turner ed., 1971); Fox, *supra* note 3, at 6, 11.

deficiencies of memory as a vault.<sup>48</sup> The dispositive consideration in the integration and development of "customary law" was that it was a cost-efficient constituent of the colonial structure and apparatus of governance.<sup>49</sup>

The primary mode of ascertaining "customary law" was by oral testimonies responsive to a series of hypothetical inquiries. By this mode, opinions of persons perceived as possessing "special knowledge," a term as problematic as it is ambiguous, were introduced and admitted as evidence of rules of customary law.<sup>50</sup> Additionally, in establishing "customary law," documentary sources were admissible as evidence.<sup>51</sup> Courts would also take judicial notice of a custom; and, over the years, they amassed a body of case law to sustain a system of *stare decisis*.<sup>52</sup> Granting that judicial precedents are not merely evidence of the law but a source of customary law, this system offered the courts considerable opportunity to play a law-making role.<sup>53</sup> However, where the precedential finding is flawed on account of unreliable evidence, *stare decisis* becomes problematic. The importance of discounting for the unreliability of initial evidence is compounded by the possibility that judicial recordations may reflect, not rules generated by empirical practices, but the judges' reinterpretation of these rules. The expedience of healthy skepticism that these concerns signify sustains Antony Allott's apt inquiry into whether a court's formulation and modification of the customary law within the borrowed framework of a western legal system can reflect a definition of customary law, in terms of the practices habitually followed by the peoples subject to that law.<sup>54</sup>

Like *stare decisis*, reliance on oral and documentary evidence equally engenders complications; it leads to the exaltation of distortions that bear limited relationship to the reality of lived experiences.<sup>55</sup> The problem of "feedback"<sup>56</sup> underscores the reciprocation between folk accounts of cultural traditions and versions recounted in popular

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48. Obiora, *supra* note 20.

49. Berry, *supra* note 38.

50. Nigerian Evidence Act, ch. 62, § 58 (1958). This provision stipulates that, in deciding questions of native law and custom, both the opinion of native chiefs or other persons having special knowledge of native law and custom, and any book or manuscript recognized by the natives as legal authority, are relevant.

51. *Id.*

52. MARTIN CHUKWUKA OKANY, THE ROLE OF CUSTOMARY COURTS IN NIGERIA 239 (1984); Gordon Woodman, *The Family as a Corporation in Ghanaian and Nigerian Law*, 11 AFR. L. STUD. 1, 1 (1974). See also Nwugege v. Adigwe, 11 Nig. L. Rep. 134 (1934); Nigerian Evidence Act, § 14(2), 73(1) (1958) (providing that where a custom has been acted upon by a court of superior co-ordinate jurisdiction, proof of such custom is not necessary).

53. JOHN WILLIAM SALMOND, SALMOND ON JURISPRUDENCE 141 (1966); G. Ezejiofor, *Sources of Nigerian Law*, in INTRODUCTION TO NIGERIAN LAW 1, 13 (C. O. Okonkwo ed., 1980).

54. Antony N. Allott, *African Customary Law: The Problem of Concept and Definition*, 9 J. AFR. L. 82-83 (1965); ANTONY N. ALLOTT, NEW ESSAYS IN AFRICAN LAW 147 (1970).

55. Terence Ranger, *The Invention of Tradition in Colonial Africa*, in INVENTION OF TRADITION, *supra* note 36, at 211, 250-51.

56. I have more fully argued the problem of feedback in Obiora, *supra* note 20. See also ANTONY N. ALLOTT, LAW AND LANGUAGE (1965); David P. Henige, *The Problem of Feedback in Oral Tradition: Four Examples from the Fanti Coastlands*, 14 J. AFR. HIST. 223 (1973); David P. Henige, *Truths Yet Unborn? Oral Tradition as a Casualty of Culture Contact*, 23 J. AFR. HIST. 395 (1982).

documents.<sup>57</sup> The documents are presumably informed by folk accounts, but the circumstances and methods of their production may result in enframing biased, innovative, inappropriate, or absolutely inaccurate reconstructions. Despite their problematic derivation, the documents eventually become assimilated into the collective consciousness, adulterating supposedly original folk accounts.<sup>58</sup> Courts rely on scholarly writings, official gazettes, and other kinds of publications and bibliographic materials, not merely as evidence of what the law may be, but as works of authority.<sup>59</sup> In so far as these works characteristically transform what they purport to catalogue and in so far as they are mainly syntheses of arguably questionable testimonies—rather than the findings of representative empirical research—their susceptibility to the problem of feedback erodes their authority.

The usurpation of indigenous consuetude for colonial purposes could have been abortive but for a reasonable degree of connivance and initiative by Africans.<sup>60</sup> The greater proportion of “expert” and other witnesses were commonly persons who had reason to redefine the rules of custom. In *In the Estate of Alayo*, Justice Brook remarked that “[m]ost of the witnesses did not know what the . . . native law and custom as to succession [were] and some had invented or adopted it to support their claims to share the estate.”<sup>61</sup> The official commitment of the colonialists to re-enact and preserve what they perceived as residuary norms from a past of pristine integrity empowered litigants to functionally tailor and couch their claims in terms of immemorial customs and values.<sup>62</sup> To paraphrase John Iliffe, Europeans believed that Africans abode by ancient traditions; Africans concocted ancient traditions as a passport to transactional success.<sup>63</sup> In order to weather the impact of change and to protect their interests within the colonial framework, women and men, affected differently by the processes of change and situated differently in the power structure, manipulated cultural narratives.<sup>64</sup> Their recollections of the past,

57. This problem is forcefully illustrated in an interesting study of the utilization of particular historical accounts as tools in the contemporary creation of identities and in politics. The study found that the relevant historicity substantially corresponded to “beyond accurate recording” of events, processes, and relationships published in colonial and post-colonial historical texts that represented subversive recasting and reinterpretation of the past in fundamentally moral, categorical terms. See *Malkki*, *supra* note 3, at 37.

58. The problem of feedback may be particularly acute in a context of legal pluralism where hierarchical spheres of legal activity (for example, statutory versus customary) interact, with one ordering and reordering the other. See J. F. Holleman, *Disparities and Uncertainties in African Law and Judicial Authority: A Rhodesian Case Study*, 17 AFR. L. STUD. 1 (1979).

59. ALLOTT, *NEW ESSAYS IN AFRICAN LAW*, *supra* note 54, at 287.

60. Ranger, *supra* note 55, at 252.

61. 19 Nig. L. Rep. 88, 93 (1946). See also *Lewis v. Bankole*, 1 Nig. L. Rep. 81 (1908).

62. See Martin Chanock, *Law, State and Culture: Thinking about “Customary Law” after Apartheid*, in ACTA JURIDICA, AFRICAN CUSTOMARY LAW 52 (1991); Martin Chanock, *Neo-Traditionalism and the Customary Law in Malawi*, 16 AFR. L. STUD. 80, 85 (1978) [hereinafter *Malawi*].

63. ILIFFE, *supra* note 10, at 324.

64. Terence Ranger suggests, for example, that small-scale gerontocracies and establishment of control by elders of land allocation, marriage transactions, and political office were a defining feature of the twentieth century and developed to counter the competitive dynamic of the nineteenth century that created opportunities for young men to establish independent bases of economic, social, and political influence. See Ranger, *supra*

as one commentator observed, became more the expression of needs than of knowledge.<sup>65</sup> The touchstone of merit for a particular narrative depended on whether the anxieties and aims of the witnesses coincided with the moral and political predilections of colonial officials.<sup>66</sup> Those whose "tradition" lost a case returned subsequently to litigate their claims with "traditions" doctored more carefully for viability.<sup>67</sup>

Against this background, several scholars maintain that "traditional" African culture is an "invented tradition" that distorts the past but became itself the reality through which a good deal of the colonial encounter was expressed.<sup>68</sup> This ideational corrective accentuates the contextuality of cultural narratives and their susceptibility to cooptation, the tenuousness of the relationship between contemporary and past cultural forms, as well as the agency of cultural participants. However, in extremity, the insight reduces culture to a set of manipulative responses, obscuring the survival of cultural elements, the capacity of cultural participants for resistance, and the normative effects of rules on behavior. For these reasons, some scholars, while conceding the merits of the revisionist insistence that customary law is "a tendentious montage with slender links to the past,"<sup>69</sup> make a cogent case for a shift in emphasis from the elements of novelty to a focus on the "exploitation of an existing repertoire, or the artificial sustaining of ancient forms, with detrimental, constraining effects upon the ruled."<sup>70</sup>

A close reading suggests that this perspective is implicit in several versions of the revisionist account that highlight the eclecticism of "invented tradition." To effectively conjure and assert a link with the past, "invented tradition" must exhibit some smatterings of "authenticity." Its appeal precludes its manifestation as an obvious aberration, and its validation depends on the extent to which it resonates and builds on popular sentiments and folkways.<sup>71</sup> Accordingly, it tends to obtain as a renegotiation of cultural content, rather than as an uncompromisingly top-down imposition of unintegrated form and meaning. The revisionist account emerged partly as a reaction to ahistorical

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note 55, at 211.

65. See *Malawi*, *supra* note 62, at 85 (citing MARK BLOCH, FEUDAL SOCIETY 113-14 (1965)).

66. WYATT MACGAFFEY, CUSTOM AND GOVERNMENT IN THE LOWER CONGO 207-08 (1970); Chanock, *supra* note 47, at 53; F. Snyder, *Colonialism and Legal Forms: The Creation of Customary Law in Senegal*, 19 J. LEGAL PLURALISM 19, 49 (1981).

67. See MACGAFFEY, *supra* note 66.

68. See, e.g., MARTIN CHANOCK, LAW, CUSTOM & SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI & ZAMBIA (1985); LAW IN COLONIAL AFRICA, *supra* note 46; Colson, *supra* note 47; Ranger, *supra* note 55, at 211, 212, 261-62.

69. Roberts, *supra* note 8, at 3. Roberts forcefully contends that the idea of the invented tradition implies an impoverished understanding of the operation of ideology that conjures a vision of the manufacture, transmission, and assimilation, intact of some new world view, and the corresponding destruction of existing cognitive and normative foundations of the lifeworld. His analysis suggests that "customary law" was neither a total nor a totalizing instrument of domination; its rules offered avenues of escape, and its meanings or implications for the lifeworlds of Africans—while subject to covert penetration and co-option—also provided the means of qualified autonomy. See Roberts, *supra* note 8. See also NATIONALIST IDEOLOGIES, *supra* note 3; AJGM Sanders, *How Customary is African Customary Law?*, 20 COMP. & INT'L L. J. S. AFR. 405 (1987).

70. Roberts, *supra* note 8, at 4.

71. See HOBSBAWM, *supra* note 3, at 92. See also Roberts, *supra* note 8.

romanticizations and immortalizations of an inviolate past. It dispels the myth of cultural traditions as natural, inert, and indispensable,<sup>72</sup> it emphasizes inventiveness and discontinuities as a caveat against banal apologists and reactionaries who selectively invoke "customary law" to entrench a particular agenda.<sup>73</sup>

On this note, a focus on relative impact is less misguided and sterile than a polarization of the issue in terms of "fictional" and "genuine." Whether real or manufactured, the acid test then becomes the implication of "customary law" for the ground-level realities of the affected population. There is nothing vexatious about rules of customary law that innovate in keeping with a situation of flux. There is ample ethno-historical evidence that dynamism is an abiding characteristic of the rules of custom. Between two successive regimes, the difference may largely be a question of degree. In one context the motion may be often understated and unperceived; in another context it may be more intense. In pre-colonial Africa, which is typically the reference point for the definition of "customary law," custom was certainly valued; but it was loosely defined and infinitely flexible.<sup>74</sup> The exigencies of survival necessitated some conservatism; yet, at the same time, growth and evolution from old needs to new needs compelled the spontaneous and incessant accommodation of adaptations and fresh initiatives.<sup>75</sup>

It was the process of establishing "customary law" that led to a manner of regularization, transforming fluid accounts of relationships into fixed rules, and negotiable claims into enforceable rights.<sup>76</sup> This is where the problem lies. The glorification of uncharacteristic orthodoxy, and orthodoxy that translates into inequity on several occasions, is a valid point of departure for deconstructionists and revisionists. As Terence Ranger poignantly put it, it is not merely that so-called "custom" changed to accommodate new circumstances or that it in fact concealed new balances of power and wealth, since this was precisely what custom in the past had always been able to do. The point is that these particular constructs of "tradition" became codified, rigid, and unable to readily reflect change in the future.<sup>77</sup> Paradoxically, the colonial regime of "customary law," which was conditioned by a specific set of ideas and exigencies, outlived its origins, almost intact.<sup>78</sup> In post-independence Africa, customary law remains more an imprint of colonial codification than it is a restoration of some ancestral past.<sup>79</sup>

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72. A common parlance analogue of this view is the saying, "tradition was once a bright new idea."

73. See Obiora, *supra* note 20.

74. Cf. Richard Abel, *Custom, Rules, Administration, Community*, 28 J. AFR. STUD. 6 (1984).

75. See Ranger, *supra* note 55. The dichotomy of conservatism and change was the great provider of emotional tension. See DAVIDSON, *supra* note 11, at 82-83.

76. See J. F. HOLLEMAN, SHONA CUSTOMARY LAW (1952); Chanock, *supra* note 47, at 65.

77. Ranger, *supra* note 55.

78. See H. F. MORRIS & J. S. READ, INDIRECT RULE AND THE SEARCH FOR JUSTICE, ch. 6 (1972); FRANCIS C. SNYDER, CAPITALISM AND LEGAL CHANGE (1981); Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20 (1984); Ranger, *supra* note 55. Cf. Campbell MacLachlan, *The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm—A Review Article*, 37 INT'L & COMP. L. Q. 368 (1988).

79. Ranger, *supra* note 55, at 211.

### *B. The Reformation of Customary Law*

The problem with nationalism is that it continues the baleful legacies of Eurocentrism and Orientalism. "Third World" nationalisms have to choose between "being themselves" and "becoming modern nations."

Partha Chatterjee<sup>80</sup>

The real tragedy . . . is when postcolonial nationalisms internalize rather than problematize the Western blueprint in the name of progress [and] modernization.

R. Radhakrishnan<sup>81</sup>

As it turned out, nationalism generally resulted in political decolonization rather than double politico-epistemological decolonization with radical implications for structural, policy, conceptual, and cognitive modalities.<sup>82</sup> The affirmative project of nation-building strengthened, instead of subverting, establishments that were vestigial of colonialism. This outcome is attributable to several reasons. One reason relates to the fact that, from the standpoint of the nationalists of the new nation-states, independence necessitated the amputation or "modernization" of whatever seemed to be suggestive of indigenous savagery. Implicit in the ideology of modernization was an obsessive concern with the West and an overwhelming preoccupation with allowing for the enjoyment of "all good things which western civilization has produced in the two millennia of its history."<sup>83</sup> In this context, "progress" was interpreted to mean the wholesale adoption and pseudo-adaptation of Western scenarios and solutions.

In the interest of clarity, it is important to indicate that the arguments articulated here do not identify a problem with the ideal of "modernization," *per se*. Rather, the problem is principally determined to inher in the way that "modernization" has been defined and in those who have controlled its implementation. Although at times responsive to objective conditions, modernization remains obliged to an imperialistic logic and ratifies a civilizing agenda that is squarely situated on appalling racist stereotypes.<sup>84</sup> Moreover, to the extent that the modernizing mission that evokes the West as a model allows Anglicized African elites to take the lead, its perpetuation is arguably born of self-interest.<sup>85</sup> Further, in material respects, the strategy is strikingly at variance with the traditionalistic stance of African nationalism, although, as will become apparent from the next subpart, this divergence is reconciled in certain contexts by the selective but determined attempts to define and enforce "tradition."

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80. PARTHA CHATTERJEE, NATIONALIST THOUGHT AND THE COLONIAL WORLD (1993).

81. Radhakrishnan, *supra* note 11, at 86.

82. See CHATTERJEE, *supra* note 80.

83. SPIRO, POLITICS OF AFRICA: PROSPECTS SOUTH OF THE SAHARA 6 (1963). See also Robert Allen Sedler, *Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System*, 13 ST. LOUIS U. L.J. 195 (1968).

84. DAVIDSON, *supra* note 11, at 18-19. See also BASIL DAVIDSON, THE AFRICAN AWAKENING 95 (1955).

85. ILIFFE, *supra* note 10, at 334; Ranger, *supra* note 55, at 211. The point is well taken that it would be disservice to completely reduce the actions of the nationalist elites to opportunistic and blindly imitative impulses. See GELLNER, *supra* note 1, at 61; HOBSBAWM, *supra* note 3, at 92.

Nationalistic legal engineering entailed the juxtaposition of a false dichotomy between "tradition" and "modernity."<sup>86</sup> By virtue of this juxtaposition, state law became a projection celebrated as a magic node of access to modernity and socio-economic vibrancy, while folk law became shunned and scape-goated as a impediment to development.<sup>87</sup> This dichotomy culminated in several reformatory interventions in the realm of "customary law." The forms of intervention most pertinent for our immediate purposes relate to the endowment of "customary law" with the trappings of modernity, such as codification, and the exorcising of perceived primitive relics. These processes tended to be imbricated and interactive, rather than mutually exclusive.

To some extent, the intervention was tantamount to an uncritical acceptance of the racist claim that pre-colonial Africa had acquired no experience relevant and valid to any process of self-government.<sup>88</sup> Yet, curiously enough, it was a latent refutation of denigrations of the authenticity of African law.<sup>89</sup> By and large, however, the notion of uniformity intrinsic in codification appealed to nationalist sentiments and aspirations to "re-establish" order and to construct a sense of collective identity.<sup>90</sup> The establishment of a reasonably permanent and standardized script afforded the possibility of cultural and cognitive storage.<sup>91</sup> It offered a semblance of order and an expedient means of managing and accommodating complex diversity.

Just as their colonial predecessors, who, influenced by the metropolitan legal form, assumed that customary law was a coherent, consistent, and insular series of determinate and definable core principles that could be categorized for jural purposes and administrative facility, governmental agencies in the nascent states engaged in the systemization of the "rules" of customary law to effect certainty and predictability in "rule enforcement."<sup>92</sup> To this end, they attempted to extract systematic, neat, and fixed rules from ideal reconstructions recorded in the reports of local consultants, archivists,

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86. On some level, the tension between tradition and modernity reflected the dilemma inherent in the reassessment and selection that attends culture contact. However, the dichotomy is false in so far as it represents the concepts as discrete and adverse. As was previously indicated, present understandings of tradition are relatively modern and modernistic, and this reconstitution is made possible by the negotiable character of tradition.

87. Cf. Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351 (1969); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969); Franz von Benda-Beckman, *Scape-Goat and Magic Charm: Law in Development Theory and Practice*, 28 J. LEGAL PLURALISM 129 (1989); . See also ALLOTT, *supra* note 54, at 177.

88. See DAVIDSON, *supra* note 11. For commendations of the colonial administration as having conferred no greater benefit than English law and justice, see B. O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES OF AFRICA 39 (1973); Kenneth Roberts-Wray, *Adaptation of Imported Law in Africa*, 4 J. AFR. L. 66 (1960). But cf. W. R. CROCKER, ON GOVERNING COLONIES, BEING AN OUTLINE OF THE REAL ISSUES AND A COMPARISON OF THE BRITISH, FRENCH & BELGIAN APPROACHES TO THEM 84 (1947); Abdul Paliwala et. al., *Economic Development and the Changing Legal System in Papua New Guinea*, 16 AFR. L. STUD. 3 (1978).

89. See Obiora, *supra* note 20.

90. OKANY, *supra* note 52, at 236 (marshalling the arguments for and against codification). See also I. OLUWOLE AGBEDE, LEGAL PLURALISM 272 (1991); Sedler, *supra* note 83, at 215-17.

91. See HOBSBAWM, *supra* note 3; GELLNER, *supra* note 1, at 8.

92. Cf. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITTS. L. REV. 1 (1983).

travellers, traders, missionaries, commissioned applied anthropologists and other researchers, assessors, expert witnesses, and judicial precedent.<sup>93</sup>

Eastern Nigeria is an example of a region that embarked on a project of recording and restating customary law.<sup>94</sup> Although the legislative mechanism for the reduction of customary law into writing existed as far back as 1948,<sup>95</sup> it was not until the 1970s that the government articulated a codification of what the State Attorney General declared "an authentic statement of the customary laws."<sup>96</sup> This publication was compiled by 461 men and two women.<sup>97</sup> Ironically, the government vehemently opposed strict codification, in the sense of statutory representation of customary law, arguing that it would only achieve formal symmetry by the mummification of customs and that traditions could not give ample scope to the salutary and inevitable mutations in values and institutions "that are currently taking place in our dynamic society."<sup>98</sup> Nonetheless, from all indications, the restatement that the government undertook operated as the functional equivalent of an informal process of codification.

Several problems are related to the restatement of customary law. One main implication of a "restatement" is that it is a comprehensive and authoritative (re)presentation of the law.<sup>99</sup> The previous passage on the evolution of customary law stands for the proposition that, while it may be authoritative, it is of questionable authority and representativeness.<sup>100</sup> Furthermore, the attempt to standardize and institutionalize the normative contents of customary law alienates it from its formative socio-cultural milieu, blurring the boundary between the "is" and the "ought." A restatement also transforms pre-existing culture—selecting, inventing, obliterating, and often reflecting the values of its vanguard elite.<sup>101</sup> More importantly, the process fosters the erasure of ambiguities and discretionary interstices that were adroitly manipulated to make concessions to peculiar circumstances, freezing flexible customs into hard prescriptions.<sup>102</sup> This crystallizing characteristic reinforced invented cultural constructs and cleavages while perpetuating the

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93. N. N. Rubin, *The Swazi Law of Succession: A Restatement*, 9 J. AFR. L. 90, 91 (1965).

94. See Eugene Cotran, *The Changing Nature of African Marriage*, in *FAMILY LAW IN ASIA AND AFRICA* 15, 27 (J.N.D. Anderson ed., 1968).

95. The Native Authority Ordinance, ch. 140 § 30 (1948).

96. THE CUSTOMARY LAW MANUAL xxxvi (S.N.C. Obi ed., 1977). The Manual was produced by the Law Revision, Research, and Reporting Division of the Ministry of Justice under a directive given by the government.

97. See *id.*

98. Official Documents of the East Central State of Nigeria, No. 7, ¶ 13 (1977).

99. Antony N. Allott & Eugene Cotran, *A Background Paper on Restatement of Laws in Africa*, in *UNIVERSITY OF IFE INSTITUTE OF AFRICAN STUDIES, INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* 18 (1971).

100. See *supra* subpart III.A.

101. See ALLOTT, *supra* note 45, at 184; Sedler, *supra* note 83, at 200; HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 346 (1966).

102. ALLOTT, *supra* note 45, at 60; WILLIAM L. TWINING, *THE PLACE OF CUSTOMARY LAW IN THE NATIONAL LEGAL SYSTEMS OF EAST AFRICA* 4 (1964); Paul Bohannan, *The Differing Realms of Law*, in *LAW AND WARFARE* 43 (Paul Bohannan ed., 1967); Ranger, *supra* note 55, at 212. See also MacLachlan, *supra* note 78.

image of immutable antiquity. At any rate, such present-day syntheses and interpretations of customary law mainly gleaned from treatises, Western considerations of morality, and the verifications of disproportionately (if not exclusively) male African elites, have gradually acquired all the trimmings of "positive" state law; and, their definitions form the core of customary law in contemporary Eastern Nigeria, as in most African contexts.<sup>103</sup>

The problems of "codification" are exacerbated by the problems of "exorcism." Customary law is applied in independent Africa by courts of a Western type presided over by Western-trained personnel who may not necessarily be far removed from the disposition of colonial officers. The appellate ruling in *Meribe v. Egwu*<sup>104</sup> underscores this point. In that case, the court of first instance upheld a custom among some patrilineal groups in Igboland that allowed a woman who had no child to secure an heir by "marrying" another woman.<sup>105</sup> The Supreme Court of the Federal Republic of Nigeria overruled the decision<sup>106</sup> and, in a formalistic stroke of the pen, reinforced on-going processes that were fortifying permeable gender boundaries and jeopardizing the cooptability of masculine status by women. Rather than probing the indigenous justification and function of the practice, the court decontextualized and situated it in an incongruous frame of reference.<sup>107</sup> The court stated:

In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be a union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a "woman to woman" marriage. Where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of section 14 (3) of the Evidence Act and ought not to be upheld by the Court.<sup>108</sup>

The implication of this decision illustrates the adverse repercussions of the continuity in colonial and nationalist policies for women.<sup>109</sup> In this respect, it is arguable that the

103. See Sanders, *supra* note 69. Cf. M. G. Smith, *The Sociological Framework of Law*, in AFRICAN LAW 24, 41 (Hilda Kuper & Leo Kuper eds., 1965) [hereinafter AFRICAN LAW].

104. 3 Sup. Ct. 23 (1976) (Nig.).

105. *Id.* at 24.

106. *Id.*

107. For insights into the indigenous perspective, see IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY (1987); VICTOR C. UCHENDU, THE IGBO OF SOUTHEAST NIGERIA (1965); Cobham, *supra* note 12; Niara Surdakasa, *The Status of Women in Indigenous African Societies*, in WOMEN IN AFRICA AND THE AFRICAN DIASPORA (Rosalyn Terborg-Penn et al. eds., 1987).

108. *Meribe*, 3 Sup. Ct. at 25. For a critique of the decision, see C. O. Akpamgbo, *A "Woman to Woman" Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles*, 14 AFR. L. STUD. 87 (1977). For further criticisms of the Eurocentric interpretation of the "repugnancy" doctrine, see AFRICAN INDIGENOUS LAWS (T.O. Elias et al. eds., 1975).

109. See AWA THIAM, SPEAK OUT, BLACK SISTERS: FEMINISM AND OPPRESSION IN BLACK AFRICA 115 (Dorothy S. Blair trans., 1986); Nawal el Saadawi, *Toward Women's Power, Nationality and Internationality*, in SPEAKING FAITH: CROSS-CULTURAL PERSPECTIVES ON WOMEN, RELIGION AND SOCIAL CHANGE 266, 274 (Diana L. Eck & Devaki Jain eds., 1986).

ordering and reordering of customary law was not merely a matter of pragmatic convenience, but a considered political choice to enforce patriarchal power and authority. The triumph of "codification," for example, coincided with exalted notions of virility and was suffused with patriarchal predilections. Consequently, the by-products of colonial dislocations received metropolitan ethos, and nostalgic distortions that eroded female status and power were crystalized and endowed with the force of law. This gender-biased outcome was facilitated by men's domination of the reformatory transactions. As in the colonial period, the convergence of men's managerial monopoly in routine public affairs and the perception of them as the custodians of traditional knowledge meant that the entire process for (re)defining and redeeming "customary law" was primarily, if not exclusively, informed by male perspectives and experiences.<sup>110</sup> Although the official script of customary rights and obligations derived from the process was skewed, it was privileged as an article of faith.

#### IV. TOWARD REVISING THE STATUS QUO: POST-DISSOLUTION MAINTENANCE

It is precisely by binding things together that traditional visions perpetuate themselves and the prejudgments contained within them; and it is by insisting on prising things apart that we have liberated ourselves from them.

Ernest Gellner<sup>111</sup>

All too often, the doors of tradition are slammed in women's faces. Yet traditions are not the sacrosanct essences of a people; they are the social inventions of a very recent origin—both the outcome and the record of political contests and power.

Anne McClintock<sup>112</sup>

A number of scholarly contributions demonstrate the extent to which men's idealization of an African past when women were subject to unquestioned male control exploited gender categories and precipitated a shift in practices pertaining to women.<sup>113</sup> This idealization was particularly evident with regard to productive resources where men's access and control was considerably valorized, while women's complementary needs and interests were occluded. Catalyzed by salient socio-economic changes and the acquiescence of the state, men's supervisory roles over land were transformed into ownership rights, while women's usufructuary rights became increasingly threatened and

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110. For details of the variables that interacted to enable this bias and the general intensification of gender asymmetry, see Obiora, *supra* note 20. See also Edwin Ardener, *Belief and the Problem of Women, in PERCEIVING WOMEN* (Shirley Ardener ed., 1975); Isichei, *supra* note 34; Ranger, *supra* note 55, at 211.

111. GELLNER, *supra* note 1, at 22.

112. McClintock, *supra* note 19, at 122.

113. See, e.g., Marcia Wright, *Justice, Women, and the Social Order in Abercorn, Northeastern Rhodesia, 1897-1903*, in *AFRICAN WOMEN & THE LAW: HISTORICAL PERSPECTIVES* 33, 33 (Margaret Jean Hay & Marcia Wright eds., 1982); Marcia Wright, *Women in Peril*, *AFRICAN SOCIAL RESEARCH*, Dec. 1975, at 803.

vulnerable.<sup>114</sup> In most instances, normative representations did not reflect the actual usufruct of women in property and inheritance.<sup>115</sup>

As the dogma of fossilized social definitions and the hierarchical structuration of gender relations gained foothold, women affected differently by the changes actively contested and maneuvered the incipient regimen and patterns of authority.<sup>116</sup> Some confronted the system through argumentation, some took recourse to uterine and other kins to mitigate changes, others engaged in a variety of acts of resistance.<sup>117</sup> In a few exceptional cases, some women were capable of contesting injustice and subverting patriarchal efforts by resorting to court where they invoked the acid test for the approval of customary norms—the repugnancy doctrine. However, despite the utility of the repugnancy doctrine for nationalistic modernization, it was not liberally applied for the vindication of women.<sup>118</sup>

There is reason to believe that the greater majority of women preferred alternative dispute resolution forums to supplicating to courts staffed exclusively by men.<sup>119</sup> But this did not prevent the hyperbolic perception of them as increasingly litigious. This perception resulted in a backlash that intensified sexist romanticizations of the past. As women took recourse to local courts to stake out and protect their claims, the courts evolved into an arena for instituting and regulating a certain kind of morality.<sup>120</sup> In the

114. See Chanock, *supra* note 47, at 53; M. Lovett, *Gender Relations, Class Formation and the Colonial State in Africa*, in *WOMEN AND THE STATE IN AFRICA* 23, 25 (Jane L. Parpart & Kathleen A. Staudt eds., 1989); Obiora, *supra* note 20; Ranger, *supra* note 55, at 254.

115. See AMADIUME, *supra* note 107.

116. It bears reiteration that social processes and events do not affect individual members of a group uniformly. The incidence on respective women tend to vary, depending on age, education, and other socio-economic factors. By the same token, these effects are typically not unidimensional. A discrete, even if minute, percentage of women may be more empowered than some men to take advantage of the system. The emphasis on gender is born out of the disparate impact on women as a group. See sources cited in *supra* note 113.

117. See Anne Hellum, *Gender and Legal Change in Zimbabwe: Childless Women and Divorce from a Socio-Cultural and Historical Perspective*, in *LAW AND CRISIS IN THE THIRD WORLD* 243, 249 (Sammy Adelman & Abdul Paliwala eds., 1993). For captivating accounts of radical challenges by women even to proportions officially castigated as "civil disobedience," see T. OBINKARAM ECHEWA, *I SAW THE SKY CATCH FIRE* (1992); Judith Van Allen, *Sitting on a Man: Colonialism and the Lost Political Institutions of Igbo Women*, 6 CAN. J. AFR. STUD. 165 (1972); Caroline Ifeka-Moller, *Female Militancy and Colonial Revolt*, in *PERCEIVING WOMEN* (Shirley Ardener ed., 1975).

118. In *Edet v. Essien*, the court relied on the repugnancy doctrine to overturn a rule that authorized an estranged husband to claim the custody of a child that his wife had with another man prior to the repayment of the bride-wealth. 11 Nig. L. Rep. 47 (1932). This case was an obvious victory for the woman involved, but it cannot sustain a conclusion that the courts were favorably disposed to the protestations of women against the established order. The case was actually a paternity and custody dispute between two men, one a pater and the other a genitor. At the end of the day, the child became affiliated with some patrilineage. But for this qualifier and the somewhat incidental nature of the interest of the woman, it is not obvious that the result of the case would have been the same.

119. See Colson, *supra* note 47.

120. The morality invoked by African men has been identified as being consistent with the British conception of patriarchy and affirming of the cause of missionaries. See *Malawi*, *supra* note 62, at 87.

realm of marriage, there emerged a picture of a golden age of relative marital stability, social harmony, and respect for traditional authority.<sup>121</sup> This claim was indexed by earmarking the assertive female plaintiff as the manifestation of imperialist culture and renegade sexual values whose irreverence of "tradition" must be stringently checked.

Even where the relationship between traditionalistic constructions and "objective history" is not necessarily contestable, invoked "primordial" norms and values may be just that—negotiable contents that served particular purposes at particular times and contexts that have since vanished. The reformatory transactions for women at the dissolution of marriage by divorce or by death illustrate this point. In the discussion that follows, it is submitted that the current conception of post-dissolution maintenance, for example, from a cultural and historical perspective, has been largely misconceived and predicated on false premises.

Nigerian "customary law," as restated by the contemporary citadel of justice, considers it unprecedented "for a wife having divorced her husband to turn rough and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to be foreign to the African conception of marriage and divorce."<sup>122</sup> This view was articulated by Justice Udo Udoma in *Coker v. Coker*.<sup>123</sup> On the other hand, the position of a widow vis-à-vis maintenance is distinguished on the ground that the death of her husband is not regarded as terminating the marriage. If the decedent is not survived by a son, his male relative is presumed to succeed to his rights and duties, including the duty of maintaining his wife. By implication, therefore, a widow is not entitled as of right to succeed to the estate of her deceased husband.<sup>124</sup> This principle was applied in *Nezianya v. Okagbue*<sup>125</sup> where the court held that customary law does not vest a widow with the absolute right of possession to her deceased husband's property.<sup>126</sup> Instead, a

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121. Some of the isolated and individual challenges of women resulted in jaundiced pontifications that have been preserved and recycled into precedents.

122. Suit # Wd/19/1961, Lagos High Court (July 1, 1963).

123. *Id.*

124. See EMMANUEL NWOGUGU, FAMILY LAW IN NIGERIA (1970); SAMUEL NWANKWO CHINWUBA OBI, MODERN FAMILY LAW IN SOUTHERN NIGERIA (1966).

125. 1 All Nig. L. Rep. 352 (1963).

126. *Id.* at 353. The devolution of the property interests of a person who dies intestate is ordinarily regulated by his or her personal law. One way of circumventing the application of customary rules of inheritance upon intestacy is by contracting a monogamous marriage under canonical or statutory law. *Nezianya* involved the intestate death of a man who died intestate but was monogamously married to a woman with whom he had a daughter. The plaintiffs were the deceased's granddaughters; the defendants were his cousins. The widow of the deceased developed his property after his death and rented it out. She attempted to sell some of the property but was obstructed by the defendants. She left the property for her granddaughters when she died, but the propriety of the transfer was contested by the defendants. In the defendants' view, they were the patrilineal next-of-kin and legal heirs of the deceased who was not survived by a son. The Supreme Court of Nigeria entered judgment in favor of the defendants. Notwithstanding the deceased's monogamous marriage, the court noted that his widow exceeded the limits of her rights when she dealt with the property as if she had absolute proprietary, as opposed to permissive, interest. *Id.* Cf. *Cole v. Cole*, 1 Nig. L. Rep. 15 (1898); *Administrator-General v. Onuo Egbuna*, 18 Nig. L. Rep. 1 (1945); *In the Estate of Emadi*, 18 Nig. L. Rep. 1 (1945).

widow's rights are limited to use and occupancy, and she may only alienate her deceased husband's property with the consent of her affines.<sup>127</sup> In the estimation of the court, even a widow's usufruct is contingent on her "good behaviour."<sup>128</sup>

Under erstwhile conditions, strong kinship ties provided an effective framework for the organization and management of subsistence and exchange.<sup>129</sup> "Kinship relations were hardly distinguishable from property relations," and kinship ideology subsumed every form of social and economic relations and rights.<sup>130</sup> Typically, in the prevalent dispensation of communal ownership, the law of property was intricately intertwined with the law of status; the household was the center of production, distribution, and consumption.<sup>131</sup> Individual members of the kin group who held communal property were at best trustees; and, to the extent that the market for the alienation or commodification of property existed, the transaction was concluded in the name of and on behalf of the entire family.<sup>132</sup> In this arrangement, post-dissolution maintenance was a welfare issue that the relative availability of kin support rendered moot.<sup>133</sup> As an eminent African scholar observed, if the question of who is to provide for the economic needs of individuals in African society had been raised one hundred years ago, such a question would have been considered purely academic.<sup>134</sup> The social and economic organization and priorities underlying most African families was such that individual economic needs were seen as part of the needs of the wider community.

127. *Nezianya*, 1 All Nig. L. Rep. at 353; NWOGUGU, *supra* note 124, at 408.

128. 1 All Nig. L. Rep. at 353. Members of a family, irrespective of sex, are entitled to occupancy and user rights on family land subject to good behavior. *See Adagun v. Fagbola*, 2 Nig. L. Rep. 110, 111 (1932). An attempted alienation of land that has been certified to be family land may be considered "bad behavior." *See Nezianya*, 1 All Nig. L. Rep. at 353.

129. *See B. A. Rwezaura, The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa*, 11 BAYREUTH AFR. STUD. SERIES: AFR. AND W. LEGAL SYS. IN CONTACT 57, 57 (1989).

130. *Id.* A woman's economic role was given social meaning by reference to her duties as a daughter, sister, wife, or mother, while the meaning of a man's economic role featured his status as a son, brother, husband, or father. *Id.* at 60. Both men and women had the ability to manipulate their social structural position. *See also MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE* 74 (1965).

131. There are ethno-historical records to suggest that this system of production and exchange was pragmatically characterized by cooperation, complementarity, and reciprocity. Respect and equitable consideration were goals and values elemental to the smooth functioning of the system.

132. Several authorities have noted that land was inalienable in the customary milieu. *See, e.g.*, *Babhun v. Oshodi*, W. Afr. Ct. App. Rep. 1, 2 (1936). However, it appears that if a family were the absolute owner of a parcel of land, no cultural decree would prohibit it from transferring its interest *in toto*, if all the members consented to the transfer. Land alienation was uncommon in the pre-colonial era because land was perceived as belonging "to a vast family of which many are dead, few are living, and countless members are still unborn." *See Amodu Tijani v. Secretary*, 2 S. Nig. App. Ct. 339 (1921).

133. *See Abdul Paliwala, Family Transformation and Family Law: Some African Developments in Financial Support on Relationship Breakdown*, in *LAW AND CRISIS IN THE THIRD WORLD* 270 (Sammy Adelman & Abdul Paliwala eds., 1993).

134. *See Rwezaura, supra* note 129.

By the same token, the structuration of marriage produced practices which worked in the past to ensure that no person was left destitute and without some degree of maintenance.<sup>135</sup> The overriding value in the African family is reflected in the non-individual nature of marriage, sometimes called the collective or communal aspect of the marriage relationship.<sup>136</sup> Indigenous conventional wisdom regarded marriage as an alliance between two kinship groups for purposes of realizing goals beyond the immediate interests of the particular husband and wife.<sup>137</sup> The social obligations for spousal and child maintenance were seen as obligations of the family at large that defaulted to extended kins where the party immediately responsible for them reneged.<sup>138</sup> As the court in *Nezianya* recognized, the reciprocal rights and obligations that arose from marriage primarily bound groups together in a relationship that outlasted the lifetime of the individual spouses.<sup>139</sup>

In the aftermath of colonialism, fundamental changes were wrought in social relations and in the general fabric of African society. The celebrated Western perspective, restated by Lord Penzance in *Hyde v. Hyde*<sup>140</sup> and echoed in the teachings of missionaries, that the institution of marriage united two individuals rather than two kin groups, instigated the nucleation of families.<sup>141</sup> The missionaries also propagated middle-class Victorian values about the ideal roles of husbands and wives, portraying husbands as economic providers and wives as mothers and homemakers.<sup>142</sup> The opportunities offered by the innovations were not lost on persons who perceived social individualization as an avenue to maximize their prospects in the new economic era.<sup>143</sup>

Other phenomenal forces that ensued at the heels of colonialism re-characterized the impact and implications of customary institutions, processes, and practices as well as of mechanisms that were devised for the relatively smooth functioning of the indigenous system; mechanisms whereby the extended family, for example, provided a cushion for contingencies. With the transformation of indigenous polities and economies, especially aggravated by the advent of the market economy and its attendant trend of individualism, kinship ties and reciprocities, as well as marriage and property relations, have assumed

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135. See *SURVEY OF AFRICAN MARRIAGE AND FAMILY LIFE* xvi (Arthur Phillips ed., 1953).

136. See T. R. Nhlapo, *The African Family and Women's Rights: Friends or Foes?*, in *ACTA JURIDICA, AFRICAN CUSTOMARY LAW* 52 (1991).

137. Inter-lineage exchanges are based on relationships traced through women as daughters, wives, and mothers. Thus, people are favorably disposed to forging alliances through the marriage of women who usually maintain strong ties with their natal homes which, in some instances, may be only a "stone's throw" away.

138. Solidarity and mutual support are recurrent themes in the worldview of the Igbo of South-Eastern Nigeria, for example. This is reflected in popular proverbs such as "unity is strength" and "*ifere adigh eme onye ara*," or "the reproach of the errant redounds on the kins."

139. 1 All Nig. L. Rep. at 353. See also Olayide Adigun, *The Interplay of Conflicting Rules: A Survey of the Customs of the Yoruba and the Effect of Modern Legislation*, 4 L. & ANTHROPOLOGY 281, 300 (1989).

140. 1 P & D 130 (1866) (Nig.).

141. Kristin Mann, *Dangers of Dependence: Christian Marriage among Elite Women in Lagos Colony, 1880-1915*, 24 J. AFR. HIST. 37, 42-43 (1983).

142. *Id.*

143. Darryl Forde, *Justice and Judgment among the Southern Ibo under Colonial Rule*, in *AFRICAN LAW, supra* note 103, at 79, 88, 94.

new meanings. More precisely for our purposes, these forces fostered the erosion of age-old values, bonds, and social insurance equivalents, even as they distorted and abrogated the rights, roles, and status of women.<sup>144</sup>

Accordingly, it is not unreasonable to submit that the application of historically contingent and received traditions, designed to govern an era when relative access to productive resources was compelled by the realities of existence to the present era of a more complex property regime and tenuous kin relations is dysfunctional. The assumptions underlying the decisions in *Coker* and *Nezianya*<sup>145</sup> are evidently defunct or, at least, well on their way to being inapplicable. For example, the decisions presumed the persistence of the extended kin safety net as a viable mode of or alternative for economic security; but this presumption is rebuttable in light of the foregoing discussion.<sup>146</sup> In the same vein, there is some indication that elaborate rules of dissolution and resource redistribution were barely existent in the pre-colonial customary milieu due to the nature of the property regime and the fact that terminal separation, not divorce, was more typical.<sup>147</sup> Therefore, evoking writ large a past, either real or manufactured, when men did not have to maintain their estranged wives as in *Coker* begs the question as much as it evades important issues of justice and fairness.

Furthermore, in *Nezianya*, besides failing to acknowledge the implications of the ambiguous phrase "good behaviour,"<sup>148</sup> the court appeared oblivious of the fact that the decedent's apparent individual ownership connotes a private property regime or some deviation from the seemingly standard communal form. At the very least, the court's finding is congruent with communitarian orientation and values in which the embedded individual is encumbered by the collective to the tune of a fundamental principle that has been articulated as "I am because we are, and because we are, I am."<sup>149</sup> However, the finding is of disputable relevance and accuracy in a context where communitarianism is devoid of its essential impulse. In contemporary times, male relatives utilize traditional legal and socio-economic relations to gain advantages, while at the same time shirking correlative traditional obligations.<sup>150</sup>

In this respect, although maintaining a widow is the quid pro quo for subrogating her deceased husband's estate, it is not unusual for affinal kins to assume the benefits without the burdens of the rule. In such circumstances of strained relations, it is not far fetched

144. See TRANSFORMATIONS OF AFRICAN MARRIAGE (David Parkin & David Nyamwaya eds., 1987); WIDOWS IN AFRICAN SOCIETIES: CHOICES AND CONSTRAINTS (Betty Potash ed., 1986).

145. See *supra* notes 122-128 and accompanying text.

146. See *supra* notes 138-42 and accompanying text. See also Rwezaura, *supra* note 129, at 77.

147. Max Gluckman, *Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal*, in AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE at 166, 204 (A.R. Radcliffe-Brown & Daryll Forde eds., 1950) [hereinafter AFRICAN SYSTEMS]; Hilda Kuper, *Kinship Among the Swazi*, in AFRICAN SYSTEMS, *supra*, at 86, 92; Monica Wilson, *Nyakyusa Kinship*, in AFRICAN SYSTEMS, *supra* at 111, 122.

148. Professor Taslim Elias makes the important point that the violation of social norms that justify forfeiture of an individual's rights in land is not easy to define in precise terms. See TASLIM O. ELIAS, NIGERIAN LAND LAW 144-45 (1971).

149. See JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY (1969).

150. See NWOGUGU, *supra* note 124, at 408; WIDOWS IN AFRICAN SOCIETIES, *supra* note 144; Rwezaura, *supra* note 129.

for the kins to trump up spurious charges of lack of “good behaviour” to inculpate and summarily dismiss a widow who, in all likelihood, made some form of contribution to the acquisition of the property in question.<sup>151</sup> In fact, a key issue that routinely escapes the consideration of the courts in post-Independence Nigeria is the difference introduced by the emergence of a private property regime and by the fact that women make significant contributions, financial or otherwise, to the acquisition of property that may be registered in their husband’s name.<sup>152</sup> On several occasions, courts have divested women of the fruits of their labor by refusing, primarily on the basis of the fact that their names are not recited along with the names of their husbands in the title to the property, to settle property in their favor.

In *Nwanya v. Nwanya*,<sup>153</sup> the appellant filed a petition in a lower court to dissolve his marriage to the respondent. The respondent prevailed on the court to order the appellant to pay her a secured maintenance in an amount the court considered representative of the value of her tangible and intangible contribution to the erection of their matrimonial home.<sup>154</sup> The parties were married in 1962; and, the respondent—who was described as a woman of substance—testified that she contributed no less than six thousand naira to the building. However, she failed to offer any concrete evidence in the form of receipts, cancelled cheques or the like, in support of her claim. In setting aside the judgment of the lower court, the court of appellate jurisdiction stated that “the court has consistently resolved issues based on evidence or inferences that can be drawn from evidence. But it has never been part of the duty of the court to resort to mere conjecture so as to make an award to a Plaintiff or Defendant that has failed to prove the claim or counter claim . . . . We have constantly been reminded that our court is not Father Christmas, hence who comes to court must come prepared to prove his claim in accordance with the law.”<sup>155</sup>

Although it did not revolve around the incidents of the dissolution of marriage, the case of *Onwuchekwa v. Onwuchekwa*<sup>156</sup> is instructive on the question of elevating form over substance. *Onwuchekwa* involved the unilateral disposition of property by a spouse. The couple had nine children who lived with the wife in the property that was the subject matter of the litigation. Although the wife averred that she and her husband mutually cooperated and pooled their money to purchase and develop the property, the husband retired to the village home and conveyed the property to a third party. When the wife

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151. It is on record that the widow in *Nezianya* improved the property that her affines claimed. 1 All Nig. L. Rep. at 353.

152. See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985).

153. 3 Nig. Wkly. L. Rep. 697 (1987).

154. *Id.* at 703.

155. *Id.* at 703, 704. In so ruling, the court declined to affirm the holding in *Kafi v. Kafi*, 3 Nig. Wkly. L. Rep. 175 (1986), in which a woman was awarded a life estate in one of her estranged husband’s pieces of property because she performed domestic duties and, additionally, managed the family business, doubling as its secretary, entertaining its clients, and participating in the negotiation for and purchase of the land in dispute. The woman bought building materials, supervised the construction, catered to the workers’ refreshment, and offered other moral and financial support. In explaining its decision, the *Kaffi* court observed that non-monetary or non-material contributions such as service were not generative of proprietary interest, but that they became salient for considerations of justice and equity. *Id.* at 177.

156. 5 Nig. Wkly. L. Rep. 739 (1991).

sued, claiming a cancellation of the sale or a declaration that she was a joint owner entitled to half of the proceeds of the sale, her husband counter-claimed that he solely and singularly acquired the property with his savings and a loan. He had receipts issued in his name to support his claim. He contended in the alternative that, even if the appellant had contributed towards the acquisition of the property, she was not entitled to restitution because he, as her husband, owned her as well as her material resources under the governing customary law.<sup>157</sup>

His wife attempted to rebut the contention by arguing that, even if such a gender-biased rule existed, it admitted exceptions and mediating circumstances, particularly for a woman who had children who would eventually inherit her property. Additionally, she argued that the alleged custom was repugnant to natural justice, equity, and good conscience, or inconsistent with a statute in force.<sup>158</sup> The trial judge conceded that the wife's contributions may well have made the existence of the property possible.<sup>159</sup> However, he insisted that nothing was unusual in her conduct and acknowledged her husband's claim.<sup>160</sup> On appeal, one of the presiding judges, Niki Tobi, observed that "It is a matter of experience that most witnesses on either traditional evidence or on customary law only come to court to give evidence in favor of the party calling them. And this they do even if they believe that the evidence they give is not correct."<sup>161</sup> Nevertheless, the court upheld the decision of the lower tribunal and found that customary law cannot be said to be repugnant to natural justice, equity, and good conscience merely because it is inconsistent with or contrary to English law.<sup>162</sup>

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157. The alleged customary norm that authorizes a husband to appropriate the nuptial property of his wife derives from the perception that a wife is the husband's "property." It is expressed in the folk proverb: "The owner of a goat owns its kid." Incidentally, local courts support the "customary" norm by analogy with the Roman law of accession. I have argued elsewhere that the alleged customary norm was probably coined in the colonial era to counteract the incipience or perceived rampancy of divorce. *See* L. Amede Obiora, All Fingers Are Not Equal: A Discourse on Law and Gender Relations in Nigeria (1995) (unpublished manuscript on file with author).

158. As indicated earlier, the statute vests courts with absolute discretion to strike customary rules and practices that are inequitable, inconsistent with existing statute, or contrary to public policy. In several instances, some of which have been unfortunate, the courts have relied on this doctrine to dismiss claims predicated on customary law.

159. *Onwuchekwa*, 5 Nig. Wkly. L. Rep. at 750.

160. *Id.* A host of factors, including the circumstances of the parties' relationship (the existence of nine children, for example), the fiction of the unity of personality, and perhaps illiteracy and naiveté on the part of the appellant, may have led the appellant to undermine the relevance of technicalities, such as having the agreement with her husband reduced to writing.

161. *Id.* at 751.

162. *Id.* at 753. *See also* Rufai v. Igbirra Native Authority, 2 N. Reg. Nig. L. Rep. 178 (1957). Note, however, the opinion in Nzekwu v. Nzekwu, 2 Nig. Wkly. L. Rep. 373 (1989), where the court stated that the conduct of a defendant who alienated his uncle's property "whilst his widow is still alive is a most callous and despicable act. He should have at least waited until the death of the plaintiff, before claiming the property . . . Any [custom which empowered the defendant to engage in such conduct is] a barbarous and uncivilized custom which in my view should be regarded as repugnant to equity and good conscience." *Id.* at 377.

While it was insightful of the court to reject ethnocentric views that utilize English law as the yardstick for measuring the moral validity of customary law, it is important to point out that the court may have either confused issues or terminated its inquiry prematurely. It is incontrovertible that the relevant community gives primacy to and actively enforces a meritocratic ideology of achievement and reward as an over-arching hallmark.<sup>163</sup> This ideology mandates resourcefulness and cooperation and promotes reward for labor participation.<sup>164</sup> It is arguably counter-intuitive and contradictory that this same cultural base would enjoin the confiscation of the property of the mother of nine children, in her lifetime and in the lifetime of her children. The court's reluctance to override an alleged local custom on account of the repugnancy doctrine and its reminiscence of colonial domination precluded its evaluation of the custom in light of post-colonial legislation. For all intents and purposes, the custom is clearly at odds with the Nigerian Constitution. Article 39 of the 1979 Constitution, which specifically prohibits discrimination on grounds of sex, articulates socio-legal equality as a fundamental objective and prohibits the ghettoization of the interests of women in the name of some spurious custom and tradition.<sup>165</sup>

## CONCLUSION

I have sought to demonstrate in this Article that, from the dawn of Independence to date, nationalism has yet to make gender relations more equitable. Regardless of the promise or declared manifesto of nationalism, women labor under discriminatory conditions that are akin to a colonialism of sorts. At inception, nationalists vowed to redeem ancestral traditions and to establish a more inclusive regime. However, the triumph of nationalism appears in material respects to have mainly enabled its almost exclusively male elites to consolidate hold-overs and infusions from the colonial period or to inscribe rules that essentially entrench their portfolios. It is particularly intriguing that, once these elites assumed office, they did not simply renege on the pledge to redeem tradition; but, they shifted the force of their allegiance to what they perceived as the Western model of development and recognized only the "tradition" that was concocted and immortalized in the crucible of colonialism or the "tradition" that they had invested with new meanings. The reality is that, while nationalists have paid lip service to, and

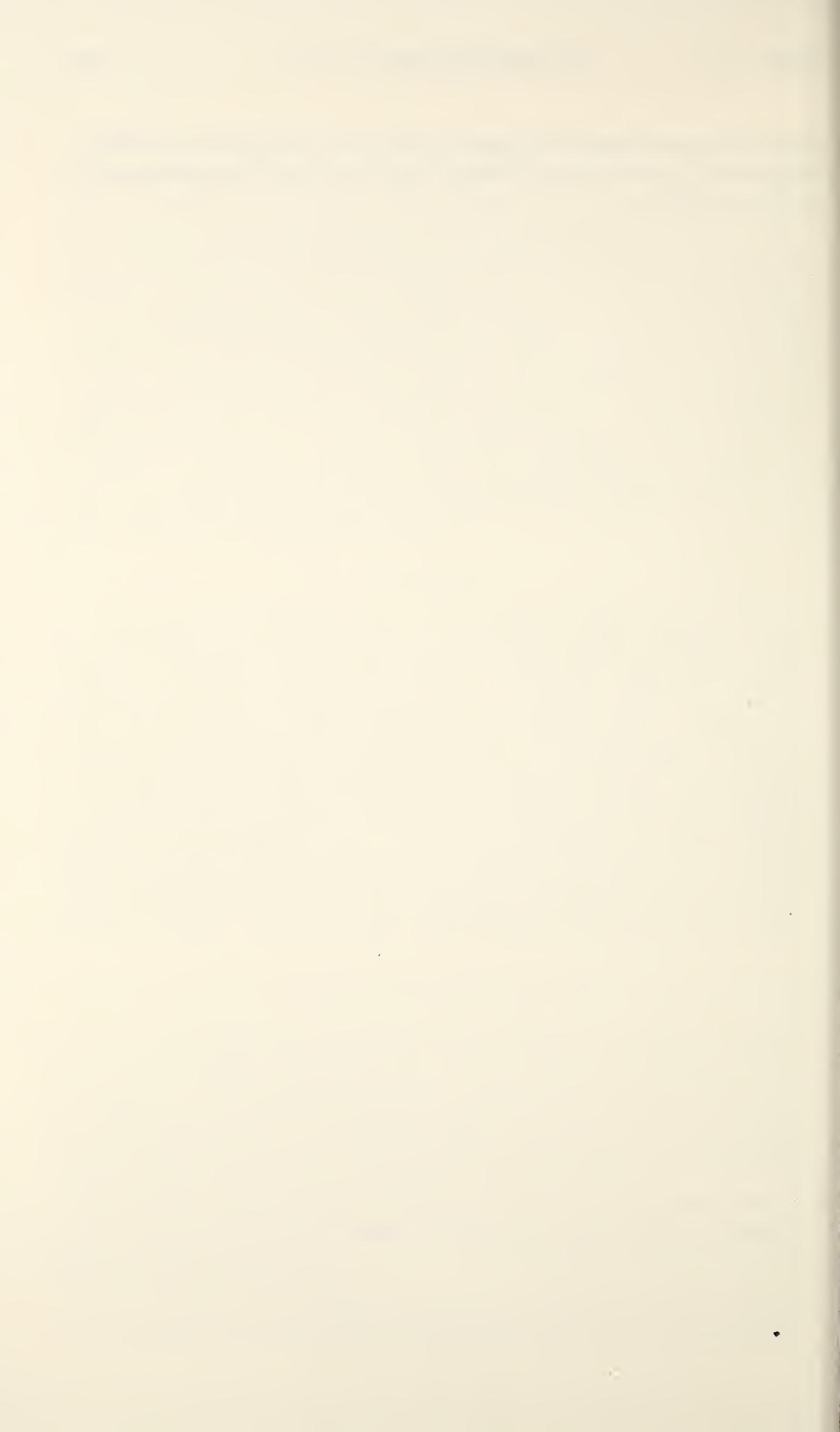
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163. Victor Uchendu notes that the Igbos subscribe to a world-view of achieved, rather than ascribed, status. This captured in Igbo saying "*nwata kwo aka, ya esoro oki rie ihe*," or "a child that washes his or her hands may dine with the elders." See UCHENDU, *supra* note 107, at 19. Uchendu is corroborated by S.N.C. Obi who maintains that a fundamental principle of Igbo customary law is that a person is entitled to the fruits of her labor where this takes the form of a consensual improvement. Professor Obi, however, reasons that in the context of divorce, this principle conflicts with the principle that non-resident strangers, such as divorced wives, are devoid of permanent rights or interests in real property. OBI, *supra* note 124, at 271-72.

164. Marriages in the community are potentially polygamous. The very survival of the institution of polygamy dictates, and depends on, the self-reliance of spouses. Hence, a wife is often the bread-winner for her unit in a polygamous household; and, even women who contract monogamous marriages have already been socialized to be enterprising and independent.

165. NIG. CONST. art. XXXIX (amended 1979). Although considerable sections of the 1979 Constitution have been suspended and/or abrogated by successive military regimes, the relevant section remains in effect.

made some sporadic attempts to implement gender equity, this objective has not been readily facilitated by their version of "Western development" or by their interpretation of culture and tradition.



# PASSIONATE ATTACHMENTS: REFLECTIONS ON FOUR MYTHS OF NATIONALISM\*

JUNE STARR\*\*

## INTRODUCTION

In this Article, I reflect on what I call the four myths of nationalism: myth one—"one people, one nation," myth two—"one people, one territory," myth three—"a people has a historic destiny which associates it with a land," and myth four (which is actually a hypothesis rather than a provable assertion)—religion is the starting point of nationalism. Nationalist leaders often use religion to rally huge masses of people to their cause. The theme of this Article is that nationalistic ideas are "social constructs"—products of particular times, places, and events. Nationalistic ideas are the products of intellectuals and activist leaders who organize and rally the masses around ideas of the "imagined community."<sup>1</sup> Nationalism becomes a passionate attachment for which individuals have extreme emotional energy, a passionate attachment to die for. An example of a passionate slogan is, "For God, for country, and for Yale."

### I. THE WORLD ORDER IN TRANSITION

To understand why and when nationalistic aspirations occur, we need to take account of the larger social context. We need to consider the world order. Nationalism, virulent nationalism, and genocide of a people only occur under certain circumstances, in certain kinds of transitional phases between the old world order which is collapsing into a new emergent one.

Not long ago many of my friends and even commentators on the international scene were saying, "Peace is breaking out all over." South African oppression of tribals and other people of color had been resolved as South Africa moved to free elections and representative government under agreements and cooperation between De Klerk and Mandela; East and West Germany were reunited into one nation, a western democratic one; and, more amazing still, the Soviet Union collapsed into itself. It took many observers time to realize that the solutions and compromises to national boundaries and territorial control that had been established in Peace Conferences and Treaties after World War II were disintegrating. The world was no longer divided between the western and eastern camps; it would no longer be run by the great superpowers—the United States and the Soviet Union—and their satellite countries. Only one super-power remained, the United States, a country now engaged at home, concerned with its own economic and social problems that had been long neglected.

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1. BENEDICT ANDERSON, *IMAGINED COMMUNITIES. REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 13-14 (1983).

Then, new disorder, chaos and horror occurred as ethnic violence and virulent nationalism broke out in many countries. Ethnic rivalries and hatreds had been held in check when groups belonged to states, and states were held in check because they were clients of the super-powers. The cement, glue and structure of international relations was collapsing, as the east-west dichotomy disappeared. With the pressure off client nations, some aggressive ethnic groups, in the name of national aspirations, turned on their countrymen. For example, in Rwanda the Hutus killed the Tutsi.<sup>2</sup> In Sukhumi, a Black Sea coastal resort in Georgian Russia, Abkhazian separatists claimed a victory against Georgians.<sup>3</sup> In nearby Azerbaijan, the Armenian province of Nagorno-Karabagh had been fighting a long and bloody war to secede from Azerbaijan, where the other ethnic groups are Azeri Turks, Russians, Kurds, and Circassians.<sup>4</sup> In Bosnia, once a Balkan province of the Ottoman Empire, the Sunni Muslims and Croats joined forces against the Christian Serb aggressors. By November 10, 1994, the Clinton Administration had stopped enforcing the arms embargo against the Muslims.<sup>5</sup> The Bosnian Serbs have had no problem getting arms, because they were heavily supplied with tanks and artillery by the Yugoslav Army.<sup>6</sup>

In France, in June, 1994, to celebrate D-day, the commemoration of the Allied landing on the Normandy beaches fifty years ago, President Clinton warned of "violent nationalism, a cancerous prejudice, eating away at states."<sup>7</sup> As Clinton celebrated the beginning of the Allied drive against the Nazis, the State Department and the National Security Council told his aides back in America to avoid referring to the mass murders in Rwanda as genocide. Spokespersons could only say that "acts of genocide may have occurred."<sup>8</sup>

However, prominent experts say that the killing of 200,000 to 400,000 people definitely reflects the deliberate and widespread extermination of an ethnic group and should be called genocide.<sup>9</sup> "Genocide" is a new term for a beastly social phenomena which has occurred periodically throughout history. The term came into use during the World War II era. It was legally defined by the United Nations Convention on Genocide in 1948, Article II:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group

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2. Peter Smerder, *Rwandan Prisoners Say They Were Forced to Kill Tutsi*, N.Y. TIMES, June 6, 1994, at A8.

3. Raymond Bonner, *Ethnic War Lacerates Former Soviet Resort Area*, N.Y. TIMES, June 8, 1994, at A3.

4. Bonner, *supra* note 3, at A3.

5. Michael R. Gordon, *President Orders End to Enforcing Bosnian Embargo*, N.Y. TIMES, Nov. 11, 1994, at A1.

6. Gordon, *supra* note 5, at A1.

7. Maureen Dowd, *Clinton Warns of Violent Nationalism*, N.Y. TIMES, June 8, 1994, at A16.

8. *U.S. Aides Avoid Labeling Horror*, N.Y. TIMES, June 10, 1994, at A1.

9. *U.S. Aides Avoid Labeling Horror*, *supra* note 8, at A1.

conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>10</sup>

The 1948 Genocide Convention, which the United States signed, requires all signatory nations to respond to genocide by investigating and punishing those who are responsible.<sup>11</sup> This strict requirement explains the reluctance of the U.S. State Department to call the events in Rwanda genocide. Meanwhile, the French have decided to lead several African armies into the Rwandan fray in order to stop the killing.

## II. THE MYTHS OF NATIONALISM

### A. *Myth One—“One People, One Nation”*

Nationalistic yearnings, especially in their more virulent forms, may and have in the past led to genocide. Nationalism is the belief that “homogenous cultural units” should be the “foundations of political life.”<sup>12</sup> In its extremist form, leaders assert “one people, one nation.” In many ways this view suffers from a pervasive myth—that only one ethnic group inhabited a region at sometime in the past. But, who lived there depends on how far back into history you trace occupation of the land. In medieval periods and even earlier, for instance, people were not organized into nations. Instead, they lived in agricultural communities, tribal groups, feudal states and empires—empires which were based mostly on trading relations and garrisons of soldiers. Therefore, in almost every case, multiple ethnic claims can be asserted to the *same* territory. Whose historical claim should prevail? Whose history of the region will become the “authentic” one? As the informed world currently witnesses, under the guise of “ethnic cleansing,” a number of ethnic groups are using military force and the terror of rape, plunder and killing to gain territorial advantage.

But, within the written historical record, no “national group” had “pure” blood lines. Breeding with other ethnic groups occurred as far back as the historical record takes us. Intermarriage among ethnic groups has always been common. National identities are more a construction of passionate leadership than narratives told generation after generation.<sup>13</sup>

### B. *Myth Two—“One People, One Territory”*

The large geographic territories needed to make a modern state economically viable have always been occupied by diverse peoples. The Armenians and Kurds occupied the same territories in what is now eastern Turkey and northern Iraq for equally long times,

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10. See GENOCIDE WATCH 2 (Helen Fein ed., 1992); FRANK CHALK AND KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 44 (1990).

11. U.N. CONVENTION ON GENOCIDE, ART. I (1948), *reprinted in* UNITED NATIONS RESOLUTIONS, Series I, vol. II, at 238 (Dusan J. Djonovich ed., 1973).

12. See ERNEST GELLNER, NATIONS AND NATIONALISM 125 (1983).

13. See ANDERSON, *supra* note 1, at 58-59; Prys Morgan, *From a Death to a View: The Hunt for the Welsh Past in the Romantic Period*, in THE INVENTION OF TRADITION 43 (Eric Hobsbawm & Terrence Ranger eds., 1984) [hereinafter THE INVENTION OF TRADITION].

living peaceably in the region under the Ottoman empire. Yet, when Kemal Ataturk used Turkish nationalism between 1914 and 1923 to rouse his compatriots against the foreign invaders—Britain, Greece, Italy, and France—he also deliberately incited Kurdish tribesmen to massacre large numbers of Christian Armenians. Later, the new Turkish military (made up of ethnic Turks, Kurds and others) would quell a Christian Nestorian mutiny and a Kurdish rebellion in 1925, led by a sixty-year old, very religious sheik. To claim that a particular ethnic or religious group has used land exclusively is not fact but fiction.<sup>14</sup> Even Native Americans, who can put forth the most profound claims to certain regions of the United States, were known to migrate during pre-conquest times and to sometimes raid each other for women and children. Of course, when land was plentiful and before the emergence of nation-states in the late eighteenth century, ethnic rivalries and hatred did not take the color of nationalistic claims that they do today.

### *C. Myth Three—“A People Has a Historic Destiny Which Associates It with a Land”*

Nationalists often feel that “ethnic cleansing”—the forcing out of a group or groups of people who are different—is necessary and even acceptable to reach the goals of nationalism. According to Ernest Gellner, an eminent Middle Eastern anthropologist, nationalism’s myths “invert reality.”<sup>15</sup>

[Nationalism] claims to defend folk culture while in fact it is forging a high culture; it claims to protect an old folk society while in fact helping to build up an anonymous mass society. . . . It preaches and defends continuity, but owes everything to a decisive and unutterably profound break in human history. It preaches and defends cultural diversity, when in fact it imposes homogeneity both inside and, to a lesser degree, between political units.<sup>16</sup>

Nationalism, then, is a very distinctive kind of patriotism, “one which becomes pervasive and dominant only under certain social conditions.”<sup>17</sup> These social conditions have occurred only in the modern world (the world since the eighteenth century) and at no other time. “Homogeneity, literacy, [and] anonymity are the key traits” that enabled nationalism to flourish.<sup>18</sup>

An essential ingredient of nationalism is communication through the media, such as newspapers, printed books, radio, movies, tape recordings, television and video. As states have centralized their power, the media has also become centralized and pervasive. Centralization and standardization of communicative units allows a fervent political party to communicate with millions of people at the same time. Apart from what is put into the specific messages, the core ideas of nationalism can easily be communicated.<sup>19</sup>

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14. See, e.g., Hugh Trevor-Roper, *The Invention of Tradition: The Highland Tradition of Scotland*, in THE INVENTION OF TRADITION, *supra* note 13, at 15 (discussing the similarity of the Celtic societies of Ireland and the Western highland and how the Scottish tradition was a retrospective invention).

15. See GELLNER, *supra* note 12, at 124.

16. GELLNER, *supra* note 12, at 124-25.

17. GELLNER, *supra* note 12, at 138.

18. GELLNER, *supra* note 12, at 138.

19. GELLNER, *supra* note 12, at 127.

*D. Myth Four—Religion Is Often the Impetus Behind Nationalism*

With the exception of Zionism and the state of Israel, religion per se has not been the driving force behind nationalism, although it does have a role to play in nationalistic movements. For example, consider the Kurdish nationalistic movement in the beginning of the twentieth century. The leaders were tribal Kurds from eastern Anatolia who were educated at a Kurdish school in Paris and became intellectuals. In Paris, they were exposed to the nationalistic ideas of a number of other groups who also wished to throw off the Ottoman yoke. Other Kurdish leaders came from the military, where they had been members of an elite Kurdish light cavalry, the Hamidiye, organized by the Ottoman Sultan Abdulhamid in 1878.<sup>20</sup> Several different Kurdish nationalistic organizations were forerunners to the major one, the Azadi, which emerged after 1908. By the early 1920s, the Azadi realized that, since the rural Kurds of the east were strongly influenced by the Sunni Muslim sheikhs, in order to mobilize the tribal Kurdish groups of eastern Turkey to resist the new Turkish army, they would have to choose a religious leader, a sheikh, as the overt leader of the revolt.<sup>21</sup> The most famous was Sheikh Said, who became the figurehead to lead the rebellion organized by Kurdish intellectuals against the fledgling Turkish Republic from February 8th until the 15th of April, 1925, when it was crushed by the Turkish army.

Interestingly, the abolishment of the Caliphate, the religious head of Turkish state, by the new government in 1924 did not rally the sheikhs, hucas and tribal leaders to the Kurdish nationalist cause. The action that galvanized the religious and tribal leaders was the threat to their large land holdings—under the new Turkish Constitution of 1924, law 1505 stated that property of large landowners who did not identify as Turks could be expropriated by the state and awarded to those who identified as Turks and they would be resettled in Kurdistan. In this example, religion provided the traditional symbol by which to rally the illiterate masses of the rural poor, but it was the possibility that their land would be appropriated that cemented the resolve of the Kurdish leaders to rebel.

Obviously, more cases in which nationalism and religion are intertwined need to be examined. But for now, I suggest that nationalists will use whatever symbols they need to rally people, religion being one of the possible rallying points.

## CONCLUSION

I started by suggesting that nationalism takes place in the larger context of the world order and that nationalisms, virulent nationalisms, ethnic cleansing, and even genocide only occur in certain times and places—in transitional phases between one old world order and a new emergent one. If this is true, and I think it is, then our best option for preventing virulent nationalism is to first strengthen world government through strengthening the United Nations, and, second, to develop standards and commitments to human rights which transcend national policy objectives (the United States has trouble

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20. See ROBERT OLSON, THE EMERGENCE OF KURDISH NATIONALISM AND THE SHEIKH SAID REBELLION, 1880-1925, at 7-8 (1989).

21. See generally MARTIN VAN BRUIJNEN, AGHA, SHAIKH AND STATE: THE SOCIAL AND POLITICAL STRUCTURES OF KURDISTAN (1992).

defining the United States' interest in Rwanda, a country that is landlocked in an area without oil, vital minerals or potential consumer markets).

Recognizing the problems entailed when the United States acts as a police force in the world, would it not be in our interest to develop a military force of the United Nations that does more than keep the peace between sides who are in negotiation? Why does the United Nations not have a Human Rights Commission of its own to investigate claims, much as Amnesty International does? Why does the international legal world not develop more clear cut criteria as to when the nations of the world should intervene in civil wars, such as those in the former Yugoslavia, in Rwanda, and perhaps in Iraq, Turkey, and Azerbaijan? Because the United States as a political entity believes in the rule of law, should we not try to strengthen the resolve of the world community against aggressive nationalism? It is a good sign that the United Nations has begun setting up a War Crimes Commission to hear cases against the military leaders in Rwanda.<sup>22</sup>

What is interesting in our common cultural heritage is not that laws, treaties and international conventions represent consensus, a common unifying ethos. What these laws, treaties and international conventions represent are the accumulated record of the most intense conflicts that the world has known and that have been resolved. They represent achievement out of the chaos, not a sublime rising above conflict. They are agreements hammered out over time, despite the weak resolve of nation-state leaders.

If people, as individuals and groups, need passionate attachments, such as are manifest in nationalism, let these attachments change. Let people and groups become devoted to tolerance, democratic principles, pluralism, and difference. Let their attachments be to cultural pluralism.

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22. *The MacNeill/Lehrer NewsHour* (PBS television broadcast, week of Nov. 1, 1994).

## ARTICLES

### ACTUALLY SHUTTING DOWN THE VIRTUAL MULTISTATE CORPORATION

MICHAEL D. WEISS\*

[O]ne in my place sees how often local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.<sup>1</sup>

#### I. A VIRTUAL PROBLEM WITH COMMERCE

##### *A. Virtual Multistate Corporations*

Because of advances in telecommunications, computerization and shipping systems, small companies can now achieve the status of national corporations "virtually." In other words, they can operate throughout the country without having any contact with the various states except through common carriers, the mail system, and voice and data communications systems.<sup>2</sup>

An important trend in the business world is the formation of "Virtual Corporations."<sup>3</sup> In common usage, a Virtual Corporation is a group of companies coming together to cooperate in a single project or a series of projects.<sup>4</sup> The constituents of the Virtual Corporation may be manufacturers, designers, marketers, competitors, customers, or

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1. OLIVER W. HOLMES, *LAW AND THE COURT, COLLECTED LEGAL PAPERS* 296 (1920).

2. Soon companies will offer electronic "showrooms" to demonstrate their products on television sets in consumers' homes. *See* Raymond W. Smith, *The Global, Interactive, Human Network: Life in the Information Age, Speech Delivered at the World Future Society Annual Conference* (Jul. 1, 1993), *in VITAL SPEECHES* 691 (1993) ("[F]or day-to-day transactions, an entire electronic marketplace will be available on demand, offering familiar services in new forms, and new services that are just waiting to be invented."). "Soon, we'll be using interactive multimedia to shop in virtual stores, browse through virtual shelves, and check out through virtual sales devices." *Id. See also* Shawn Tully et al., *Winning Companies: 20 Companies on a Roll*, *FORTUNE*, Nov. 22, 1993, at 21, 32 (describing the "interactive shopping" network being set up by CUC International in Orlando, Florida and San Francisco).

3. *See* John A. Byrne et al., *The Virtual Corporation*, *BUS. WK.*, Feb. 8, 1993, at 98 (stating that "the virtual model could become the most important organizational innovation since the 1920s").

4. Patrick Bloomfield, *Why Success Belongs to the Agile: Inside the "Virtual Corporation,"* *FIN. POST*, March 2, 1994, at 2, 23. The term was coined by Roger Nagel, a professor at the Iacocca Institute at Lehigh University in Bethlehem, Pennsylvania. *Id.; see also* Byrne et al., *supra* note 3, at 99; David C. Churbuck & Jeffrey S. Young, *The Virtual Workplace*, *FORBES*, Nov. 23, 1992, at 184, 186; Thomas W. Malone & John F. Rockart, *Computers, Networks and the Corporation*, *SCI. AM.*, Sept. 1991, at 128, 134-36.

anyone else with an interest in the project. For example, a manufacturer will manufacture, while a product-design company decides what to make, and a marketing company sells it.<sup>5</sup> Such corporations rely on high-speed communications<sup>6</sup> to unite team members in different parts of the country—who, often, have never met.<sup>7</sup>

Virtual Corporations are more efficient than actual corporations because they only employ the people (or companies) they need to get a job done. When the job is done, the Virtual Corporations can disband and another differently constituted corporation can take its place to accomplish the next goal. Such corporations have been compared to “a more powerful and flexible version” of Japanese business’s *keiretsu*.<sup>8</sup>

“Virtual” is taken from the technology of virtual reality—the use of computers, video, and sound equipment to give the illusion of reality.<sup>9</sup> In virtual reality, the world that appears to be there does not actually exist. A Virtual Corporation, similarly, appears to exist but does not.<sup>10</sup>

Virtual Multistate Corporations (VMCs) are corporations that do business in many states while concentrating their assets and personnel in a single state.<sup>11</sup> They appear to be multistate corporations because they solicit customers in, and ship products to, the fifty states, but they are actually small companies with their limited facilities and personnel concentrated in one state.

These VMCs have extremely low overhead because they do not have to set up offices or showrooms in each of the fifty states.<sup>12</sup> They can do business successfully with all of

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5. Byrne et al., *supra* note 3, at 98.

6. See Ian Austen, *The Virtual Corporation: The Future Workplace: No Offices, No Staff and After the Work is Done, No Jobs*, OTTAWA CITIZEN, March 12, 1994, at B2. See also Bloomfield, *supra* note 4 (“The key to corporate success is using today’s worldwide communication and transportation systems to meet specific customer needs in specific markets in as cash-efficient a manner as possible.”).

7. See Byrne et al., *supra* note 3, at 102 (“InterSolve’s recently completed assignment for First Interstate, for example, saw the creation of four teams of 26 experts led by McPherson, who had met only one of the team members before the assignment.”).

8. Byrne et al., *supra* note 3, at 101. *Keiretsu* are powerful integrated groups of companies that, “[b]ecause of a network of social and educational links among executives, as well as extensive cross-holdings, interlocking directorships, and long-established business connections,” work together permanently to dominate their markets. WILLIAM J. HOLSTEIN, *THE JAPANESE POWER GAME* 200-01 (1990).

9. See Tanya Pobuda, *Virtual Stores Peddle Wares On-Line*, COMPUTER DEALER NEWS, Dec. 13, 1993, at 28.

10. See Roc McQueen, *Virtual Companies Learn that the Only Reality is Action*, THE FIN. POST, April 2, 1994, at 7 (“What is a virtual corporation? Think of it this way: if something’s transparent, that means it exists but it’s not visible. By contrast, if something’s not there, but you can see it, it’s virtual.”).

11. A VMC, as used in this Article, could well be a component of a virtual corporation. For example, a VMC in the marketing business could team up with a manufacturer and a product designer; this virtual corporation could produce a product and market it nationwide with minimal overhead. See, e.g., Tully et al., *supra* note 2, at 21, which discusses InfoNow, a company marketing a “virtual” electronic store” on CD-ROM. The company does not write the software or produce the CD-ROMs; it contracts out the production and even customer relations. “Since the virtual store has no overhead, its prices are roughly equal to those of the cheapest mail-order houses.” Tully et al., *supra* note 2, at 21.

12. See Bloomfield, *supra* note 4, at 23 (“The key to corporate success is using today’s worldwide

their personnel in their home states. Similarly, they do not have to hire legal counsel or stock goods except in their home states. These low costs are passed on to consumers in several forms. For example, a VMC in the business of selling goods may offer consumers lower prices than intrastate companies or actual multistate companies.<sup>13</sup> A VMC may also give credit to consumers who could not otherwise obtain it.<sup>14</sup>

### *B. Development Hindered by Regulations*

Why is this sort of corporation—a corporation that provides the unquestionable social benefits of lower prices and more available credit—not developing faster? A nationwide framework of regulations makes the successful development of VMCs difficult. While having contact primarily with one state, VMCs are subject to the regulatory laws of all fifty states, as well as the laws of the federal government. The laws themselves are vague; no one could be sufficiently familiar with the laws of the other states to securely operate in them all.

An example of regulation that is extremely damaging to VMCs is that governing deceptive trade practices. All fifty states have laws forbidding “unfair” or “deceptive” trade practices (DTPAs).<sup>15</sup> Under these laws, virtually anything could be an unlawful

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communication and transportation systems to meet specific customer needs in specific markets in as cash-efficient a manner as possible.”). Actual multistate companies, by contrast, have offices and personnel in more than just their home states. For example, a large multistate company like General Electric will have representatives in all 50.

13. Most Americans take advantage of the benefits of virtual corporations by making mail-order purchases. *See State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991) (Over 54% of Americans made mail-order purchases in 1990.). *See* Tara Aronson, *Plans By Post*, S.F. CHRON., Feb. 16, 1994, at 1/Z1 (Consumers can purchase house plans by mail, saving thousands of dollars in architects’ fees.); Helen Susik, *Mail-Order Pharmacies can Provide Real Savings*, ST. PETERSBURG TIMES, Jan. 26, 1993, at 18 (Consumers can order drugs from “managed drug programs”—mail-order pharmacies—at a savings of up to 50% off local pharmacy prices.); *Mail-Order Pharmacies Mushroom, Saving Companies Money*, DALLAS MORNING NEWS, Nov. 29, 1992, at 17H (The mail-order drug market is worth \$4 billion.).

14. There are other advantages to mail-order purchasing. *See, e.g.*, Jeff Ubois, *Being Savvy About Mail Order Can Save Your Company Cash*, MACWEEK, Jan. 11, 1993, at 22 (noting that mail order’s benefits include “fast, convenient delivery; large savings; money-back guarantees; . . . quality technical support . . . [and] guaranteed availability”). *See* Smith, *supra* note 2, at 691. The author stated that:

If the industrial [sic] revolution gave rise to the gigantic corporate monolith, the information revolution will create the thousand points of light of an entrepreneurial culture—where power and creativity are dispersed, decentralized, and democratized.

The key to success in this environment won’t be a monopoly franchise, but a market franchise, based on the characteristics of any winning company: cost, quality, variety, reliability, and choice.

Smith, *supra* note 2, at 691.

15. *See* ALA. CODE §8-19-1 (1993 & Supp. 1994); ALASKA STAT. § 45.50.471 (1986 & Supp. 1993); ARIZ. REV. STAT. ANN. § 44-1521 (1994); ARK. CODE ANN. § 4-88-101 (1991 & Supp. 1993); CAL. CIV. CODE § 1750 (West 1983); COLO. REV. STAT. § 6-1-101 (1973 & Supp. 1990); CONN. GEN. STAT. ANN. § 42-110 (West 1992 & Supp. 1994); DEL. CODE ANN. tit. 6 § 25 (1994); D.C. CODE ANN. 28-3904 (1991 & Supp. 1994); FLA. STAT. ANN. § 501.201 (West 1988 & Supp. 1994); GA. CODE ANN. § 10-1-370 (1994); HAW. REV. STAT.

practice.<sup>16</sup> Since deceptive trade acts do not allow for the issuance of opinion letters by

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§ 481A-1 (1992 & Supp. 1993); IDAHO CODE § 48-601 (1994); ILL. ANN. STAT. ch. 815, para. 505 (Smith-Hurd 1993 & Supp. 1994); IND. CODE § 24-5-0.5-1 (1980 & Supp. 1994); IOWA CODE ANN. § 714.16 (West 1993); KAN. STAT. ANN. § 50-623 (1983 & Supp. 1993); KY. REV. STAT. ANN. § 367.110 (Michie/Bobbs-Merrill 1987 & 1992); LA. REV. STAT. ANN. § 51:1401 (West 1987 & Supp. 1994); ME. REV. STAT. ANN. tit. 5, § 205-A (West 1989 & Supp. 1993); MD. CODE ANN. COM. LAW I § 13-101 (1990 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 93A (West 1984 & Supp. 1993); MICH. COMP. LAWS ANN. § 445.901 (West 1989 & Supp. 1994); MINN. STAT. ANN. § 325D.42 (West 1981 & Supp. 1994); MISS. CODE ANN. § 75-24-1 (1991 & Supp. 1994); MO. REV. STAT. § 407.010 (1990 & Supp. 1994); MONT. CODE ANN. § 30-14-101 (1993); NEB. REV. STAT. § 29-1601 (1994); NEV. REV. STAT. § 598.0903 (1994); N.H. REV. STAT. ANN. § 358-A:1 (1984 & Supp. 1993); N.J. STAT. ANN. § 56:8-1 (West 1989 & Supp. 1994); N.M. STAT. ANN. § 57-12-1 (Michie 1987 & Supp. 1994); N.Y. GEN. BUS. LAW § 349 (McKinney 1988 & Supp. 1994); N.C. GEN. STAT. § 75-1 (1985 & Supp. 1993); N.D. CENT. CODE § 51-15-01 (1989 & Supp. 1993); OHIO REV. CODE ANN. § 1333 (Anderson 1993); OKLA. STAT. ANN. tit. 15, § 751 (West 1993 & Supp. 1994); OR. REV. STAT. § 646.605 (1988 & Supp. 1994); 73 PA. CONS. STAT. § 201-1 (1993); R.I. GEN. LAWS § 6-13.1-1 (1992 & Supp. 1993); S.C. CODE ANN. § 39-5-10 (Law Co-op. 1985 & Supp. 1993); S.D. CODIFIED LAWS § 37-24-1 (1994); TENN. CODE ANN. § 47-18-101 (1988 & Supp. 1994); TEX. BUS. & COM. CODE ANN. § 17.41 (West 1987 & Supp. 1994); UTAH CODE ANN. § 13-11-1 (1992 & Supp. 1994); VT. STAT. ANN. tit. 9 § 2451a (1993); VA. CODE ANN. § 59.1-196 (Michie 1992 & Supp. 1994); WASH. REV. CODE ANN. § 19.86.010 (West 1989 & Supp. 1994); W.V.A. CODE § 46A-6-101 (1992 & Supp. 1994); WIS. STAT. ANN. § 100.18 (West 1988 & Supp. 1993); WYO. STAT. § 40-12-101 (1993).

16. Whether a practice is deceptive or unfair depends on:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

FTC v. Sperry & Hutchinson, Co., 405 U.S. 233, 244-245 at 680 n.5 (1972) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed.Reg. 8355 (1964)).

Actual deception is not required. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944). If an advertisement has the capacity to deceive an appreciable segment of the public, it will be found deceptive. Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957). The public includes “the ignorant, the unthinking, and the credulous.” Feil v. FTC, 285 F.2d 879, 902 n.18 (9th Cir. 1960). “Laws are made to protect the trusting as well as the suspicious.” FTC v. Standard Educ. Society, 302 U.S. 112, 115 (1937). Intent is not relevant to deceptiveness. FTC v. World Travel Vacation Brokers, 861 F.2d 1020, 1029 (7th Cir. 1988). Omission of “material” facts makes an advertisement deceptive. Waltham Watch Co. v. FTC, 318 F.2d 28, 30 (7th Cir. 1963), *cert. denied*, 377 U.S. 944 (1963) (Foreign origin was a material fact.). These illustrations of the deceptive trade practices minefield are all from cases applying the FTCA. A company’s uncertainty will increase when it is faced with 50 such vague statutes.

It makes sense that “deceptive” and “unfair” should be organic and flexible terms that can include newly-invented practices. The house conference report on the FTCA noted that:

[I]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the

the state regulators, a company cannot know if it is safe from suit under any state's deceptive trade practices law until it has tried a particular practice; by that time, it is too late. The uncertainty and instability created by these various regulations make interstate work difficult and expensive, especially for VMCs, who, despite the large geographic scale of their business, may actually do a relatively small volume.

### C. A National Free Market

This difficulty in setting up national shop was not the intent of the framers of the Constitution.<sup>17</sup> One of the main purposes of the United States Constitution was to encourage a free national market in goods.<sup>18</sup> To this end, the Commerce Clause<sup>19</sup> gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.”<sup>20</sup> In addition to empowering Congress in the area of interstate commerce, the Commerce Clause acts to prevent the states from interfering with or discriminating against interstate commerce.<sup>21</sup>

Analysis of the sources contemporaneous with the drafting and adoption of the Dormant Commerce Clause finds that the intention of the framers was that Congress should have plenary power over what was then included in interstate commerce.<sup>22</sup> One

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method of definition, it would undertake an endless task.

H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess., 19 (1914). Thus, while 32 of the 51 DTPAs (i.e. in 50 states and the District of Columbia) have “laundry lists” itemizing practices that are deceptive, *see Lee, infra* note 193, at app. I, they also provide for other (non-itemized) practices to be found deceptive.

“What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed?” THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST].

17. THE FEDERALIST NO. 62, at 381.

18. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 327, 330 (1944) (“The very purpose of the Commerce Clause was to create an area of free trade among the several states.”). *See also* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (“[A] central concern of the Framers that was an immediate reason for calling the Constitutional Convention” was the conviction that the Union would have to avoid economic balkanization.).

*See also* THE FEDERALIST NO. 56, at 346-47 (James Madison) (“What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.”); THE FEDERALIST NO. 42, at 283-84 (James Madison) (“The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples as well as our own.”).

19. U.S. CONST. Art. 1, § 8, cl. 3.

20. *Id.*

21. *See* discussion *infra* subpart V.B.

22. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 493 (1941). “On the whole, the evidence supports the view that, as to the restricted field which was deemed at the time to constitute regulation of commerce, the grant of power to the federal government presupposed the withdrawal of authority *pari passu* from the states.” *Id.* at 493. Abel also noted that

There is . . . not a single occasion in the proceedings of the convention itself where the grant of power over commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead, it was uniformly mentioned as a device for

thing then included in interstate commerce was "the mercantile aspect."<sup>23</sup> The question of whether restrictions on deceptive trade practices by VMCs are encompassed by this aspect remains open.<sup>24</sup>

The mercantile aspect of commerce in 1787 included foreign commerce and the carrying trade.<sup>25</sup> It also included, however, the idea of the merchant "as a person who characteristically possesses correspondents in other states . . . . The statement clearly envisaged large-scale operations as the merchant's task and correspondingly excluded the processes of local distribution."<sup>26</sup> The merchant's activities "conform nicely to those of the present day importer, commission house, and wholesale firm, with just a dash of the commodity exchange; they hardly embrace those of the jobber, the hawker, or the retailer, who to us is the merchant par excellence."<sup>27</sup>

A sketch of eighteenth century merchants recognizes:

the difference between their status and that of tradesmen, and between commerce, and "buying and selling"; of their connection with correspondents in other states; of the possibility of their becoming segregated in a few centers instead of being dispersed throughout the country. They are the means by which the surplus manufactures and the staple agricultural products of the country are marketed, and a supply of goods not locally produced is introduced into the various sections of the country. They are "speculative traders" whose "adventures" are subject to be defeated by the possibility that their "plans may be rendered unlawful before they can be executed."<sup>28</sup>

These characteristics describe the modern direct-mail VMC. That entity has traits in common with the importer, the commission house, the wholesale firm, and the commodity exchange, as well as with the hawker and the retailer. Much of the business of the eighteenth century merchant is done by the twentieth century direct marketer. Accordingly, such a corporation is squarely within the ambit of the Commerce Clause.

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preventing obstructive or partial regulations by the states.

*Id.* at 471. Abel draws extensively from FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911), using the documents collected in that work to discuss the stated and implied views of the candidates on all sides of each aspect of the commerce question.

23. Abel, *supra* note 22, at 459. Another aspect of commerce was the "customs and revenue aspect," Abel, *supra* note 22, at 446, which encompassed the regulation of foreign trade for revenues through duties and imports. See Abel, *supra* note 22, at 480. The third aspect of "commerce" in 1787 was "the maritime and navigation aspect." Abel, *supra* note 22, at 451. The subject matter at hand—use of DTPAs as revenue tools by AGs—is apparently neither foreign trade as such nor maritime or navigatory matters.

24. The reason the question is open—that no such thing as a virtual corporation existed in 1787—militates against asking the question at all. The founders did not conceive of the problems of virtual corporations, so one should ask only whether those problems are included within "commerce" today. This Article will nevertheless attempt to answer the question.

25. Abel, *supra* note 22, at 462.

26. Abel, *supra* note 22, at 463.

27. Abel, *supra* note 22, at 464.

28. Abel, *supra* note 22, at 464.

While it appears that the major focus of the convention was on foreign trade, the Clause also included the phrase “and among the several States.” This phrase was intended *mainly* in the negative—“to control state-created discriminations and preferences.”<sup>29</sup> One purpose of the Clause was the “purely negative function of vetoing state-imposed barriers (and specifically fiscal barriers) to interstate trade.”<sup>30</sup> Interstate commerce was discussed only nine times in the convention:

In three of these instances, reference was made to the potentialities of the clause as affording a means of protection against injury inflicted by hostile or harmful restrictions or regulations of sister states, without intimating what particular type of state commercial regulation was thus to be stricken down . . . . The other six all refer in like manner to the anticipated operation of the grant [of commerce power to Congress] in preventing discriminatory commercial regulations by states, but mention particular subjects of legislation as being affected.<sup>31</sup>

Thus, the intention of the framers of the Constitution was only to prevent state restrictions on interstate commerce, and not to allow the federal government the quantum of control over interstate commerce that it was given over foreign trade. Under this historical reading of the Commerce Clause, the interstate business of VMCs is an appropriate subject for constitutional protection.

In addition to empowering Congress in the area of interstate commerce, the Commerce Clause prevents the states from interfering with or discriminating against interstate commerce.<sup>32</sup> The jurisdiction of the federal courts gives them the procedural power to protect the free market by preventing state actions that would harm interstate commerce.<sup>33</sup> For example, the Court has wielded this power to strike down state laws imposing sales taxes<sup>34</sup> and discriminatory use taxes<sup>35</sup> on out-of-state companies.

Because discriminatory taxation of out-of-state companies has been held unacceptable by the Supreme Court, states now seek other means of increasing their revenues at the expense of out-of-state businesses. One such method is the discriminatory use by state attorneys general (AGs) of trade practices regulations to force out-of-state companies to avoid expensive litigation by paying settlements.<sup>36</sup>

Theoretically, the search for more money should be most thorough in those states that have self-funding, or predatory, agencies.<sup>37</sup> Many states’ attorneys general are funded, either directly or *de facto*, from their revenues—the more they bring in, the more they

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29. Abel, *supra* note 22, at 469.

30. Abel, *supra* note 22, at 469.

31. Abel, *supra* note 22, at 470. These particular subjects are: state export duties, state imports, tolls on interior waterways, inspection fees, and “compulsory entry and clearance.” Abel, *supra* note 22, at 471.

32. See discussion *infra* subpart V.B.

33. See discussion *infra* subpart V.B.

34. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

35. See discussion *infra* subpart V.B.

36. See discussion *infra* Part IV.

37. A self-funding or predatory state agency is one whose budget depends on its income. See *infra* subpart II.B.4.

have to spend.<sup>38</sup> Therefore, they prey on national VMCs as a sort of "cash calf"—unable to defend itself in their state, yet still worth milking.

This Article will describe this practice by state attorneys general, and the burden it imposes on interstate commerce. It will then propose several solutions to this problem, both specific (to solve the problem in a particular case) and general (to remove the problem entirely).

## II. FUNDING OF STATE ATTORNEYS GENERAL

Funding for AGs varies among the states. Almost half of the states require that all money received by the AGs be deposited directly into the state treasury. The other half of the states range from self-funded to partially-funded.

### *A. Direct Deposit into Treasury*

The first group of states consists of those that require the AGs to turn over all funds to the state treasury. Alaska,<sup>39</sup> Colorado,<sup>40</sup> Connecticut,<sup>41</sup> Georgia,<sup>42</sup> Illinois,<sup>43</sup> Indiana,<sup>44</sup> Kansas,<sup>45</sup> Maryland,<sup>46</sup> Michigan,<sup>47</sup> Minnesota,<sup>48</sup> Mississippi,<sup>49</sup> Nebraska,<sup>50</sup> New York,<sup>51</sup>

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38. See *infra* notes 39-60 and accompanying text.

39. ALASKA STAT. § 37.10.060 (1993) ("All fees and receipts received by the Department of Revenue from any source shall be deposited in the state treasury at least once each month, and credited by the department to the proper fund."). In an action instituted by the AG, "necessary and reasonable costs of the suit and of the additional counsel shall be advanced by the state, and a sum recovered in the suit shall be deposited in the state treasury." *Id.* § 37.10.100.

40. COLO. REV. STAT. § 24-31-101(d) (1988) ("Any moneys received by him belonging to the state or received in his official capacity shall be paid forthwith to the department of the treasury.").

41. CONN. GEN. STAT. ANN. § 35-32(a) (West Supp. 1994) ("All . . . (2) funds awarded to the state or any agency of the state for the recovery of costs and attorney's fees in an antitrust action, (3) civil penalties imposed . . . , (4) damages collected by the state for injuries to its business or property pursuant to a judgment or settlement agreement in an antitrust action, shall be deposited in the general fund."). Is this indicative of other funds received?

42. GA. CODE ANN. § 45-12-92 (1990) ("All departments, agencies, and budget units charged with the duty of collecting taxes, fees, assessments, or other moneys . . . shall pay all revenues collected by them into the state treasury on a monthly basis.").

43. In Illinois, the AG has the duty "to pay into the state treasury all moneys received by him for the use of the state." ILL. REV. STAT. ch. 15, para. 205/4 (1993). The same information is restated in another paragraph. *Id.* ch. 30, para. 220/11 (1993) ("All fees collected by the . . . AG, shall be paid into the state treasury.").

44. IND. CODE. ANN. § 4-6-2-4 (Burns 1990) ("It shall be the duty of the AG to . . . pay over to the proper officer all money collected at the end of each month."). The proper officer is the state treasurer. IND. CODE. ANN. § 4-8.1-2-6 (Burns 1990) ("Before moneys may be deposited in the state treasury, the treasurer of state must receive from the person or agency making the deposit a report of collections due the state treasury.").

45. KAN. STAT. ANN. § 75-706 (1989) ("All moneys received by the AG belonging to this state shall, immediately upon receipt thereof, be paid by him or her into the state treasury."). In another section a list is given of the means by which the AG would receive money that is payable to the treasury. *Id.* § 75-709 (1989) ("It shall be the duty of the AG to pay into the state treasury for the benefit of the general revenue fund all fees

North Carolina,<sup>52</sup> Pennsylvania,<sup>53</sup> Tennessee,<sup>54</sup> Texas,<sup>55</sup> Utah,<sup>56</sup> Virginia,<sup>57</sup> West Virginia,<sup>58</sup> Wisconsin,<sup>59</sup> and Wyoming<sup>60</sup> are discussed in this group. Although the AGs

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and allowances of every kind and character paid to him or her under color of any general or special statute for criminal convictions secured by him or her in violations of the prohibitory law.”).

46. MD. CODE ANN. STATE FIN. & PROC. § 3-304(b) (1988 & Supp. 1994) (“[T]he Unit may enforce a statutory or written contractual obligation of a debtor to pay costs in addition to principal, including collection costs, counsel fees, or interest penalties.”). The funds that are collected are deposited into the State Treasury, unless the unit of State government being awarded the funds is not in the State Treasury, then only the net proceeds go into the State Treasury. *Id.* § 3-305.

47. MICH. COMP. LAWS. ANN. § 14.33 (West 1994) (“All moneys received by the AG, for debts due, or penalties forfeited to the people of this state, shall be paid by him, immediately after the receipt thereof, into the treasury.”).

48. In Minnesota, “[a]ll income, including fees or receipts of any nature, shall be credited to the general fund, except . . . as otherwise provided by law.” MINN. STAT. ANN. § 16A.72 (West Supp. 1994). Except when receiving fees from executive branch agencies, “[a]ll other receipts from assessments must be deposited in the state treasury and credited to the general fund.” MINN. STAT. § 8.15 (1993).

49. MISS. CODE ANN. § 7-5-33 (1991) (“He shall account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or any subdivision thereof.”).

50. In Nebraska, the AG must “pay all money received, belonging to the people of the state, immediately upon receipt thereof, into the state treasury.” NEB. REV. STAT. § 84-205 (1987).

51. In New York, the AG shall “pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.” N.Y. EXEC. LAW § 63 (McKinney 1993).

52. In North Carolina, the AG has a duty to “pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.” N.C. GEN. STAT. § 114-2 (1993).

53. PA. STAT. ANN. tit. 71 § 73-204 (1990) (“The attorney general shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth . . . for collection by any Commonwealth Agency.”).

54. In Tennessee, “it is the duty of every department, institution, office and agency of the state and every officer and employee of state government . . . collecting or receiving state funds, to deposit them immediately into the treasury.” TENN. CODE ANN. § 9-4-301 (1992).

55. In Texas, “[t]he attorney general shall immediately pay into the state treasury money received for a debt or penalty.” TEX. GOV’T CODE ANN. § 402.007 (West 1990).

56. In Utah, the AG has a duty to “account for, and pay over to the proper officer, all moneys which come into his possession, that belong to the state.” UTAH CODE ANN. § 67-5-1(3) (1993). The state treasurer is the proper officer. *Id.* § 67-4-1. (“It is the duty of the state treasurer: (1) To receive and keep all moneys belonging to the state . . .”).

57. VA. CODE ANN. § 2.1-180 (Michie Supp. 1987) provides:

Every state department, division, officer, board, commission, institution . . . collecting or receiving public funds, or moneys from any source whatever, belonging to or for the use of the Commonwealth, or for the use of any state agency, shall hereafter pay the same promptly into the state treasury, without any deductions on account of salaries, fees, costs, charges, expenses, refunds, or claims.

58. In West Virginia, the fees received by the AG when he appeared as counsel for the state, “shall be paid into the state treasury and placed to the credit of the state fund.” W. VA. CODE § 5-3-5 (1994).

59. WIS. STAT. ANN. § 20.906(1) (West 1986) provides:

Unless otherwise provided by law, all moneys collected or received by any state agency for or in

may seem immune from the incentives that this Article will discuss, they are not. The amount of money allocated to the AG is generally proportional to what he adds.<sup>61</sup>

### *B. De Facto Funding Methods*

The AGs' offices in the remaining states range from partially-funded to self-funded. These states are classified into the four following groups: percentage of funds/partial control; percentage of funds/total control; total funds/partial control; and total funds/total control.

1. *Attorney General Has Partial Control Over Certain Funds.*—The following states allocate a percentage of the funds received by the AG into a special fund over which the

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behalf of the state . . . shall be deposited in or transmitted to the state treasury . . . All moneys paid into the treasury shall be credited to the general purpose revenues of the general fund unless otherwise specifically provided by law.

No specific instances are cited that would allow the AG to circumvent this rule. For example, in WIS. STAT. ANN. § 776.43 (1993), any "necessary costs and disbursements incurred in bringing and prosecuting such action by the attorney . . . shall be audited by the department of administration and paid out of the state treasury."

60. WYO. STAT. § 9-1-409(c) (1994) ("Every state officer, employee, department or commission receiving revenue for or on behalf of the state from any source shall pay all revenue to the state treasurer as directed by him.").

61. *See supra* notes 39-60.

AG exercises partial control: Arizona,<sup>62</sup> Arkansas,<sup>63</sup> Florida,<sup>64</sup> Kentucky,<sup>65</sup> Louisiana,<sup>66</sup>

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62. ARIZ. REV. STAT. ANN. § 41-191.03(B) (Supp. 1992) ("The attorney general may expend from the collection enforcement revolving fund such monies as are necessary for the collection of debts owed to the state, including reimbursing other accounts or departments within the office of the attorney general from which monies or services for collection were provided."). The funds are allocated 35% to the special fund and 65% to the general fund. *Id.* § 41-191.03(C), (D).

63. ARK. CODE ANN. § 19-2-101(a)(1), (8) (Michie 1994) provides:

It shall be the duty of . . . the Attorney General . . . to issue their receipts respectively for all moneys coming into the State Treasury through their departments, respectively, on account of:

(1) Fees of every kind and character; . . . and

(8) All matters pertaining to the duties of the Attorney General when money belonging to the state is to be collected . . . .

For example, "[a]ll moneys collected from civil penalties shall be paid to the State Treasurer for deposit in the general fund." *Id.* § 20-21-204(7)(A) (Michie 1994).

Although § 20-21-204(7)(A) provides that all moneys be deposited in the general fund, Arkansas has a special fund called the Elder and Disabled Victims Fund, in which certain moneys received from civil penalties are deposited. ARK. CODE ANN. § 4-88-202(b) (Michie Supp. 1993) ("The civil penalties imposed . . . shall be deposited with the State Treasurer and placed into the Elder and Disabled Victims Fund, a special fund created in the state treasury and administered by the Attorney General for the investigation and prosecution of deceptive acts against elder and disabled persons and for consumer education initiatives.").

64. FLA. STAT. ch. 16.53(2) (Supp. 1994) provides:

Twenty percent of all moneys recovered by the Attorney General on behalf of the state, its agencies, or units of state government and 10 percent of all moneys recovered on behalf of local governments . . . or, alternatively, attorneys' fees and costs, whichever is greater, in any civil action for violation of state or federal antitrust laws shall be deposited in the fund."

The remainder of the money is deposited in the General Revenue Fund. *Id.* ch. 16.53(4)(b).

The special fund remains part of the State Treasury, and the Legislature retains control over it. *Id.* ch. 16.53(1) ("There is created in the State Treasury the Legal Affairs Revolving Trust Fund, from which the Legislature may appropriate funds . . . ."). This provision allows the State Legislature to fund other programs with the money the AG's office generates and gives the AG an incentive to litigate as much as possible.

65. KY. REV. STAT. ANN. § 218A.435(7) (Michie/Bobbs-Merrill Supp. 1993) ("The principal of the trust fund shall be distributed: (a) Eighteen percent (18%) of the funds received in any fiscal year shall be allocated to the unified prosecutorial system to be disbursed by the Attorney General . . . .").

The AG has only partial control over the funds in that the AG may disburse the percentage of funds allocated to him by the Justice Cabinet. *Id.* § 218.435(4) and 218.435(6). ("The trust fund shall be administered and audited by the Justice Cabinet. . . . The Justice Cabinet shall 'allocate the moneys in the fund quarterly, on a percentage basis.'").

In other proceedings, the AG will deposit all moneys into state depositories and maintain records for the State Treasurer. KY. REV. STAT. ANN. § 41.070(1) (Baldwin 1993) ("All receipts of any character of any budget unit, all revenue collected for the state, and all public money and dues to the state shall be deposited in state depositories . . . .").

66. The money for the fund comes from judgments and settlements which the treasurer then matches for deposit into the fund. LA. REV. STAT. ANN. § 49:259B ("[T]he treasurer . . . shall pay into the fund an amount equal to the amount of proceeds received by the state from court-awarded judgments and settlements except those judgments and recoveries made on or pertaining to any office of risk management litigation,

Missouri,<sup>67</sup> Nevada,<sup>68</sup> New Hampshire,<sup>69</sup> New Jersey,<sup>70</sup> Ohio,<sup>71</sup> and Washington.<sup>72</sup>

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recovery, or intervention.”). The money is then appropriated by the legislature to the Department of Justice for operating expenses. *Id.* § 49:259C (“The monies in the fund shall be available for appropriation by the legislature to the Department of Justice solely for the purpose of paying the . . . general operating expenses of the department, and defraying the costs of expert witnesses, consultants . . .”).

67. MO. ANN. STAT. § 416.081(3) (Vernon 1990) (“Ten percent of all recoveries obtained by the attorney general . . . whether by settlement or judgment, shall be paid into the state treasury to the credit of the antitrust revolving fund.”). The money in the fund is available for the payment of all costs and expenses incurred by the AG in investigation, prosecution and enforcement of laws relating to antitrust, trade regulation, restraint of trade, or price fixing activities. *Id.* § 416.081(2). The AG must, however, present a voucher to the State Auditor who will present a warrant to the State Treasurer. *Id.* § 416.081(1).

Missouri did have an Attorney General Court Cost Fund. MO. REV. STAT. § 27.080 (1992). This fund has been abolished by *id.* § 33.571(2), and is now an account in the general fund of the state treasury (“The state treasurer and the commissioner of administration shall establish appropriate accounts within the state treasury and . . . those accounts shall be the successors to the enumerated funds.”). *Id.* § 33.571(2).

68. NEV. REV. STAT. ANN. § 228.097 (Michie 1992) (“Except as he is required by NRS 228.096 to deposit certain money in a special fund, the attorney general shall deposit in the state general fund all money collected by him which is in excess of the amount authorized for expenditure by the legislature.”).

Nevada statutorily creates, however, a special revenue fund for the AG called the attorney general’s special fund. *Id.* § 228.096(1), 228.096(2) (“The attorney general’s special fund is hereby created as a special revenue fund. . . . 2. . . . all money received by the attorney general . . . relating to private investigators and to recoveries for unfair trade practices must be deposited in the state treasury for credit to the AG’s special fund.”).

The amount of money deposited into the special fund from the enforcement of unfair trade practices is set forth in NEV. REV. STAT. ANN. § 598A.260 (Michie 1994) (“1. All attorney’s fees and costs and 10 percent of all recoveries for credit to the AG’s special fund. 2. The balance of the recoveries for credit in the state general fund.”).

69. N.H. REV. STAT. ANN. § 125-F:22IV (1990) (“All civil penalties collected under this section, shall be forwarded to the state treasurer. The state treasurer shall deposit all moneys received under this section . . . to the public health services special fund, which shall be nonlapsing.”).

70. N.J. STAT. ANN. § 52:18-29 (West 1986) (“All moneys of the state collected or received by any state institution, board, commission, department, committee, agent or servant, from any source, shall except as otherwise provided by law be paid into the state treasury . . .”).

However, there is a revolving fund for the expense incurred by the AG in antitrust litigation. *Id.* § 56:9-19 (“[T]here are hereby appropriated as a revolving fund the sums derived [from litigation instituted by the Attorney General under this act or the antitrust laws of the United States] . . . for the purpose of paying any additional expenses incurred by the Attorney General in . . . litigation instituted under the antitrust laws of the United States.”). The Director of the Division of Budget and Accounting and the Legislative Budget and Finance Director must approve any expenditures from this fund. *Id.*

71. OHIO REV. CODE ANN. § 109.081 (Anderson Supp. 1993) (“Nine per cent of all amounts collected by the AG, . . . on claims due the state shall be paid into the state treasury to the credit of the AG claims fund, which is hereby created. The fund shall be used for the payment of expenses incurred by the office of the AG.”).

A second special fund is the attorney general antitrust fund in which ten percent of monies received from antitrust litigation are allocated. *Id.* § 109.82. (“Ten per cent of all recoveries obtained from antitrust cases by settlement or judgment in any court . . . shall be paid into the state treasury to the credit of the attorney general antitrust fund, which is hereby created. The fund shall be used for expenses of the antitrust section.”).

2. *Attorney General Has Total Control Over Certain Funds.*—In four states, the AG has total control of a percentage of the moneys deposited into a special fund. The states are Hawaii,<sup>73</sup> Maine,<sup>74</sup> North Dakota,<sup>75</sup> and Oklahoma.<sup>76</sup>

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72. “The Attorney General shall: . . . (11) [p]ay into the state treasury all moneys received by him for the use of the state.” WASH. REV. CODE ANN. § 43.10.030 (West 1983). The Legal Services Revolving Fund was created in the state treasury for legal services provided by the AG to other state agencies. *Id.* § 43.10.150. (“A legal services revolving fund is hereby created in the state treasury for the purpose of a centralized funding, accounting, and distribution of the actual costs of the legal services provided to agencies of the state government by the attorney general.”). Court costs, attorneys’ fees, and other expenses recovered by the AG shall be deposited in the fund. *Id.* § 43.10.200. Disbursements are pursuant to vouchers from the AG. *Id.* § 43.10.160.

73. The AG “shall account, in the manner provided by law, for all fees, bills of costs and other moneys collected or received by him by virtue of his office.” HAW. REV. STAT. § 28-7 (1988). A revolving fund called the criminal forfeiture fund is established in the Department of the AG. HAW. REV. STAT. § 712A-16(4) (1994) (“There is established in the department of the attorney general a revolving fund to be known as the criminal forfeiture fund, . . . in which shall be deposited one-half of the proceeds of a forfeiture. . . . All moneys in the fund shall be expended by the attorney general. . . . The payment of any expenses necessary to seize, detain, . . . or sell property seized, detained or forfeited.”). The AG has total control over this fund in that he may “promulgate rules and regulations concerning . . . the use of the fund.” *Id.* § 712A-16(5).

Hawaii has, with a few exceptions, legislatively abolished its special funds. *Id.* § 37-51 (“The purpose of this part is to place all special funds under legislative and executive budgetary control in the same manner as the general fund, with the exception of those funds subject to applicable federal laws or regulations and payments on principal and interest on revenue bonds.”).

74. ME. REV. STAT. ANN. tit. 5, § 203-A (West Supp. 1993). When the AG receives money for antitrust enforcement or the enforcement of the Maine Unfair Trade Practices Act, she deposits the money into a special revenue account. *Id.* The statute provides:

When, pursuant to a court order or settlement, the attorney general receives money that is specifically designated for antitrust enforcement or for enforcement of the Maine Unfair Trade Practices Act, the Attorney General is authorized to expend such funds for expert witness fees, . . . and any other purpose in accordance with the court order.

*Id.*

75. The AG has a duty to “[p]ay into the state treasury all moneys received by him for the use of the state.” N.D. CENT. CODE § 54-12-01.13 (Supp. 1993).

North Dakota does have two special funds which allow the AG total discretion in expending them. One fund is called the Attorney General Assets Forfeiture Fund, which includes all funds from the forfeiture of property. *Id.* § 54-12-14 (“The funds are appropriated to the attorney general . . . (3) For paying, at the discretion of the attorney general, any expenses necessary to seize, detain, inventory, safeguard, maintain, . . . or any other necessary expenses incident to the seizure, detention, or forfeiture of such property.”). The fund may not exceed \$500,000 and any monies in the excess of that amount are deposited in the general fund. *Id.*

76. The AG has a duty “[t]o pay into the State Treasury, immediately upon its receipt, all monies received by him belonging to the state.” OKLA. STAT. ANN. tit. 74 § 18b (West Supp. 1994). Of the money received by the AG and paid into the State Treasury, 25% will be deposited into a special fund designated the AG’s Evidence Fund. *Id.* tit. 74 § 19 (“[T]wenty-five percent shall be deposited in a special agency account fund in the State Treasury, designated the Attorney General’s Evidence Fund, which fund shall be a continuing fund.”). The money for the fund comes from “reimbursement of court costs, fees and other expenses and other appropriated monies” and will be used by the AG “for necessary expenses relative to any pending case or other

3. *Attorney General has Partial Control Over All Funds.*—Eleven states have funds into which all the monies from an action are paid, but the AG retains only partial control over the fund. The states are California,<sup>77</sup> Montana,<sup>78</sup> North Dakota,<sup>79</sup> Ohio,<sup>80</sup> Oklahoma,<sup>81</sup> Oregon,<sup>82</sup> Rhode Island,<sup>83</sup> South Dakota,<sup>84</sup> Vermont,<sup>85</sup> and Washington.<sup>86</sup>

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matter within the official responsibility of the Attorney General.” *Id.* The cost of litigation shall be paid out of the Attorney General’s Evidence Fund. *Id.* tit. 74 § 20hB (“Cost of litigation shall include, but is not limited to court costs, deposition expenses, travel and lodging, witness fees and other similar costs . . .”).

77. “The Attorney General shall account for and pay over to the proper officer all money which may come into his possession belonging to the State or to any county.” CAL. GOV’T CODE § 12521 (West 1992). However, the money from charitable trust enforcement actions by the AG, shall be used for future charitable trust enforcement actions. *Id.* § 12598(d) (“All moneys received by the Department of Justice pursuant to this section shall be deposited into the General Fund and shall be used to offset the costs of future charitable trust enforcement actions by the attorney general.”).

78. A 1991 amendment to the Montana Code, deleted the duty that the AG must “account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or to any county,” with no comparable statement as a substitute. MONT. CODE ANN. § 2-15-501 (1992). This amendment suggests that the AG no longer has this obligation and can control the funds of his office.

This interpretation may be supported by *id.* § 17-2-202, which provides:

The department of administration may, in its discretion, permit any state agency to retain in its possession, under conditions the department of administration may prescribe, moneys that would otherwise be deposited in the agency fund. . . . The department of administration may cancel this permission and require the deposit of the moneys with the state treasurer.

However, since permission would remain within the discretion of the Department of Administration, the AG would retain only partial control.

79. N.D. CENT. CODE § 54-12-18 (Supp.1993) (“The attorney general shall deposit all moneys recovered by the consumer protection division for refunds to consumers in cases where persons or parties are found to have violated the consumer fraud laws, all costs, expenses, attorney’s fees, and civil penalties collected . . . regarding consumer protection or antitrust matter . . .”). The monies are to “pay costs, expenses, and attorney’s fees and salaries incurred in the operation of the consumer protection division.” *Id.* § 54-12-18(4).

80. OHIO REV. CODE ANN. § 109.11 (Anderson Supp. 1992) (“There is hereby created in the state treasury the attorney general reimbursement fund that shall be used for the expenses of the office of the AG in providing legal services and other services on behalf of the state.”). Monies received for reimbursement for legal services and other services that have been rendered to other state agencies are paid to the state treasury and to the credit of the fund. *Id.*

81. OKLA. STAT. ANN. tit. 74 § 19.1 (West Supp. 1994) provides:

There is hereby created in the State Treasury a revolving fund for the Office of the Attorney General to be designated the “Attorney General’s Law Enforcement Revolving Fund.” The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of any monies received from the sale of confiscated property, the seizure and forfeiture of confiscated monies, property, gifts, bequests, revises or contributions, public or private, including federal funds unless otherwise provided by federal law or regulation. All monies accruing to the credit of said fund are hereby appropriated and may be budgeted and expended by the Attorney General for the purposes of investigation, enforcement and prosecution of cases involving criminal and forfeiture laws of this state and the United States of America or to match federal grants. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law

4. *Attorney General is Self-Funded.*—In eight states the office of the AG is self-funded. The statutes in four states require the AG to “account for” monies received. This rule implies that the AGs have total control of incoming funds with the single limitation of having to “account” to the treasury. These states are Iowa,<sup>87</sup> Massachusetts,<sup>88</sup> New

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with the Director of State Finance for approval and payment.

*Id.* The AG does not have total control over the funds because the Director of State Finance must approve of any expenditures from the fund. *Id.*

82. OR. REV. STAT. § 180.095(3) (1991) (“All sums of money received by the Department of Justice under a judgment, settlement or compromise, including damages, attorney fees, costs, disbursements and other recoveries, in actions and suits under the federal antitrust laws shall, upon receipt, be deposited with the State Treasurer.”). The monies in the account will be disbursed with approval of the State Treasurer “to pay for . . . all costs, disbursements and other litigation expenses incurred by the Department of Justice in preparing, commencing and prosecuting actions and suits under the federal antitrust laws.” *Id.*

A second special account is the Department of Justice Operating Account, from which monies are appropriated to pay Department of Justice expenses incurred by the Department of Justice except litigation expenses for actions and suits under federal antitrust laws. *Id.* § 180.180. These monies are deposited in the State Treasury. *Id.*

83. R.I. GEN. LAWS § 7-15-4.1(a) (1993) (“There is hereby established within the general treasury of the state a special fund to be known as the asset forfeiture fund in which shall be deposited all proceeds of any forfeitures.”). To receive money from this fund, the AG must apply to the presiding justice upon the application of a law enforcement agency. *Id.* § 7-15-4.1(d). (“[T]he Attorney General may apply to the presiding justice of the superior court for the release from the general treasury of sums of money not to exceed fifty thousand dollars (\$50,000) per investigation.”).

84. The AG has a duty “[t]o pay into the state treasury all moneys received by him, belonging to the state, immediately upon the receipt thereof.” S.D. CODIFIED LAWS § 1-11-1(10) (1992). The AG does, however, have access to the antitrust special revenue fund, into which the AG has the power to make deposits and from which the AG has the power to make disbursements under court order. “The fund may receive funds paid to the state of South Dakota as a result of judgments or settlements of antitrust lawsuits.” *Id.* § 1-11-6.1 “The Attorney General is hereby authorized to make deposits into and disbursements from said fund, pursuant to order of a court, on vouchers approved by him.” *Id.* § 1-11-6.3.

85. VT. STAT. ANN. tit. 32 § 502(a) (Supp. 1992) (“The gross amount of money received in their official capacities by every administrative department, board, officer or employee, from whatever source, shall be paid forthwith into the state treasury . . . . Such moneys shall be credited to such funds as are now or may hereafter be designated for the deposit thereof.”). The Commissioner of Finance and Management must warrant any expenditure from the funds. Vermont has an Anti-Trust Restitution fund and a Consumer Fraud Recoveries Fund similar to the funds discussed above. *Id.* tit. 32 § 589.

86. WASH. REV. CODE ANN. § 43.10.215 (West 1983) (“There is hereby created the antitrust revolving fund in the custody of the state treasurer which shall consist: of . . . funds awarded to the state or any agency thereof for the recovery of costs and attorney fees in an antitrust action . . . .”). The AG may expend funds “for the payment of costs, expenses and charges incurred in the preparation, institution and maintenance of antitrust actions under the state and federal antitrust acts.” *Id.* § 43.10.220.

87. IOWA CODE ANN. § 13.2 (West 1989) (“It shall be the duty of the attorney general . . . [to] [p]romptly account, to the treasurer of state, for all state funds received by the attorney general.”).

88. In Massachusetts, “[t]he AG and the district attorneys shall account to the state treasurer for all fees, bills of costs and money received by them by virtue of their offices.” MASS. GEN. LAWS ANN. ch. 12, § 29 (West

Mexico,<sup>89</sup> and South Carolina.<sup>90</sup> The other four states are Alabama,<sup>91</sup> Arizona,<sup>92</sup> Delaware,<sup>93</sup> and Idaho.<sup>94</sup> Their statutes specifically allow them total control over incoming funds.

### III. AGENCY BEHAVIOR

More than half of the state AGs are at least partially self-funded. This Part will discuss the critical effect of self-funding on the behavior of AGs. First is an examination

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1986).

89. In New Mexico, the AG has a duty to "promptly account to the state treasurer for all state funds received by him." N.M. STAT. ANN. § 8-5-2 (Michie 1994).

90. In South Carolina, "[t]he Attorney General shall account to the State Treasurer for all fees, bills of costs and moneys received by him by virtue of his office." S.C. CODE ANN. § 1-7-150 (Law. Co-op. 1986).

91. ALA. CODE § 36-15-4.2 (1993) provides:

(a) There is hereby established in the state treasury a special fund to be known as the attorney general's litigations support fund.

(b) The said fund may consist of any and all moneys designated by a court order as reasonable attorney fees and related expenses received by the attorney general . . . as a result of any fees, fines, restitution, forfeitures, penalties, costs, interest or judgments collected pursuant to any criminal or civil litigation . . . .

(c) The Attorney General shall have the authority to expend moneys appropriated by the legislature from the fund . . . .

(e) The appropriation of these moneys shall be in addition to any moneys appropriated to the Attorney General's office from the state general fund . . . ."

92. In addition to the collection enforcement fund previously mentioned, Arizona had "created an antitrust enforcement revolving fund to be administered by the attorney general." ARIZ. REV. STAT. ANN. § 41-191.02A (1992). All monies recovered by the AG as a result of enforcement of antitrust, restraint of trade, or price-fixing activities or conspiracies will be deposited in the fund for the AG to use in future litigation of such issues. *Id.* §§ 41-191.01A, 41-191.02C. "Monies in the fund shall be used by the attorney general for costs and expenses of antitrust enforcement undertaken by his office and may be expended for such items as filing fees, courts costs, travel, depositions, . . . investigations, and like costs and expenses." *Id.* § 41-191.02C.

93. DEL. CODE. ANN. tit. 6, § 7329(a) (1992). The fund will consist of moneys received by the state in securities actions ("All moneys received by the State as a result of administrative or court actions brought by the Attorney General . . . shall be credited by the State Treasurer to a fund to be known as the "Investor Protection Fund . . . ."). *Id.* The AG is authorized to expend moneys from the fund to further litigate administrative and court actions. *Id.* § 7329(d) ("The Attorney General is authorized to expend from the Investor Protection Fund such moneys as are necessary for: (1) The payment of costs, expenses and charges incurred in the preparation, institution and maintenance of administrative and court actions . . . .").

94. In Idaho, it is the duty of the AG to "account for and pay over to the proper officer all moneys which may come into his possession belonging to the state or to any county." IDAHO CODE § 67-1401.3 (1989). The proper officer is the state treasurer. *Id.* § 67-1302. In an action for consumer protection with regard to monopolies and trade practices, however, the monies received by the AG are deposited in a special consumer protection account. *Id.* § 48-606 ("All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection account which is hereby created in the state operating fund. Moneys . . . shall be used for the furtherance of the attorney general's duties and activities under this chapter.").

of the rationale for regulation in a democratic society, focusing on rational choice literature. Second is a discussion on the incentive structures in which regulatory agencies act, concluding that the incentive structure encourages agencies and their members to behave in a manner that serves their self-interests and not those of the public. Third is a discussion of self-interested behavior in regulation. Fourth is an examination of the Federal Trade Commission as an example of self-interested behavior at the federal level. The final section relates perverse incentives for agency behavior to efforts to remedy the problem of strangulation of VMCs, and the implications of failure to do so.

#### *A. Public Choice and Regulation*

In a democratic society, people make collective decisions in order to prevent self-interested individuals from imposing unfair costs on other individuals.<sup>95</sup> The study of collective choice examines the economization of decision costs by comparing public decision-making to the economic theory of markets.<sup>96</sup> These studies also address the synonymous field, "social choice."<sup>97</sup> This discussion compares the Madisonian theory of democracy with modern economic theory to explain the use of collective choice in a democratic society.<sup>98</sup> While collective decision-making sacrifices some of the utility of each individual, it does so in order to protect individuals from others, thus preserving individual benefits in the long run. In modern societies, agencies or other representatives of the public make collective decisions in order to reduce decision-making costs.<sup>99</sup> The

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95. VINCENT OSTROM, THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION 45 (1989). The author stated:

The assumption that individuals will adopt a maximizing strategy implies the consistent choice of those alternatives which an individual thinks will provide the greatest net benefit as weighed by his or her own preferences. This can be expressed alternatively as the choice of the least-cost strategy and is equivalent to the efficiency criterion.

*Id.*

96. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 17 (1962).

97. Gary Durden, *Determining the Classics in Social Choice*, 69 PUB. CHOICE 265 (1991) ("The term 'social choice' is used broadly, to include not only works by K.J. Arrow . . . but also Anthony Downs, James Buchanan, Gordon Tullock, Mancur Olson, William Niskanen, and others from modern 'public choice.'").

98. BUCHANAN & TULLOCK, *supra* note 96, at 24; Peter P. Swire, *Bank Insolvency Law Now That It Matters Again*, 42 DUKE L.J. 469, 520 n.189 (1992) ("Public choice can be defined as the economic study of nonmarket decisionmaking, or simply the application of economics to political science." (quoting DENNIS C. MULLER, PUBLIC CHOICE 1 (1979))). The author further stated that:

The FDIC can be seen as an agency trying to expand its power and protect the insurance fund. Members of Congress, meanwhile, have been concerned since the passage of FIRREA with avoiding voter backlash for the bailout. With the interests of FDIC and Congress thus aligned, the result has been a 'strict' approach to bank and thrift failures, expressed as the grant of extraordinary new powers to the FDIC. The temptation for the agency and Congress is to push costs of the bailout off-budget and onto third parties.

*Id.* at 520-521.

99. BUCHANAN & TULLOCK, *supra* note 96, at 5; SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 187 (1992) has noted that:

Self-interested behavior is a fact of life. People who recognize this are neither liberal or

importance of this cost reduction must be emphasized in order to understand the reconciliation of conflicting interests.<sup>100</sup>

A considerable body of literature discusses the modeling and analysis of individual benefits and costs in collective decision-making. The above statements, however, provide a good basis for examining bureaucracies and their role in regulation. If the public agents assigned to make public decisions do so in a manner that results in increased costs, whether imposed directly or incurred through the decision-making process, then the agency is not serving the best interests of the public. Logic dictates that regulation should be restricted to those activities that serve the public interest at large. Likewise, it is fair to argue that any agency behavior that imposes unnecessary costs on the public is outside the scope of the mission of the agency.

The public choice model, as presented here, explicitly requires that an agency be chartered to work within a structure that is conducive to efficient operation. This prescription, however, is not always strictly followed.<sup>101</sup> Many analyses of bureaucratic structure, and the results thereof, lead to the conclusion that many inefficiencies result from attempts to improve the situation of agency personnel, especially administrators.<sup>102</sup> Most economic theories of agency behavior suggest that all actors in the political arena, including bureaucrats, wish to improve their own situations.<sup>103</sup> As bureaucrats gain tenure

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conservative. They are realists. The dream of foregoing a public policy consensus is just that. People have different goals, tastes, talents, and resources. Procedures for managing conflict are central to the design of social institutions.

The market is one such institution. Its great strength in a diverse world is its impersonality. . . . Political institutions and decisionmaking procedures are required for decisions that can only be made collectively.

*Id.*

100. BUCHANAN & TULLOCK, *supra* note 96, at 4; ROSE-ACKERMAN, *supra* note 99, at 187.

101. See ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE 235 (1953). The authors stated that:

The prescribed charter of a bureaucracy represents, to a very high degree, a conscious and deliberate attempt to adapt the structure and personnel of the organization to the most efficient achievement of goals prescribed by the top leaders in, or outside, the bureaucracy. The operating charter tends, of course, to depart from prescription, sometimes quite extensively.

*Id.*

102. *Id.* at 243. See OSTRUM, *supra* note 95 at 53; GORDON TULLOCK, THE POLITICS OF BUREAUCRACY, PUBLIC AFFAIRS PRESS (1965).

103. BUCHANAN & TULLOCK, *supra* note 96, at 5; GORDON TULLOCK, CONCLUDING THOUGHTS IN PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 336 (1987). See also LOUIS K. BRAGAW, MANAGING A FEDERAL AGENCY: THE HIDDEN STIMULUS 6 (1968); WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); ANTHONY DOWNS, INSIDE BUREAUCRACY (1967). The author noted that:

The fundamental premise of the theory is that bureaucratic officials, like all other agents in society, are significantly—though not solely—motivated by their own self-interests. Therefore, this theory follows the tradition of economic thought from Adam Smith forward, and is consistent with recent contributions to political science made by such writers as Simmel, Truman, Schattschneider, Buchanan, Tullock, Riker, and Simon.

in their agency, their interest in maintaining a foothold in the agency increases, due to their potential losses and their loyalty to the agency. As a result, they are more selfish and exhibit less public-oriented behavior.<sup>104</sup> In light of these tendencies, that public choice theorists question regulatory policy on a consistent basis is not surprising.<sup>105</sup>

### *B. Incentive Structure in American Public Policy*

In the social sciences, it has become commonplace to say that politicians and bureaucrats behave in their own best interests. This is no longer cynical or speculative, but simply realistic.<sup>106</sup> The truth of this assertion was not commonly recognized, however, until James Buchanan and William Niskanen each produced extensive models on self-interested behavior in agencies.<sup>107</sup> Buchanan's work won him a Nobel prize, and has been cited extensively. Niskanen, an Economic Adviser to President Ronald Reagan and later Chairman of the Cato Institute, provided a model that applies more directly to this discussion.<sup>108</sup> Under Niskanen's model, the public choice rationale, government officials

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Specifically, the theory rests upon three central hypotheses:

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2. Bureaucratic officials in general have a complex set of goals including power, income, prestige, security, convenience, loyalty (to an idea, an institution, or the nation), pride in excellent work, and desire to serve the public interest. This book postulates five different types of officials, each of which pursues a different subset of the above goals. But regardless of the particular goals involved, every official is significantly motivated by his own self-interest even when acting in a purely official capacity.

*Id.* at 2.

104. ADA W. FINIFTER, POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II at 416 (1993).

105. In ROSE-ACKERMAN, *supra* note 99, at 15, the author noted that:

As cost-benefit analysts began to accept the limitations of their techniques, public choice scholars started to use economic analysis to undermine the legitimacy of existing regulatory policies. They saw legislation as the outcome of political dealmaking that frequently did no more than preserve or enhance the monopoly power of existing producers. Some concluded that government should be prevented from intervening in the economy since its actions were usually no more than devices to benefit narrow, well-organized interests.

ROSE-ACKERMAN, *supra* note 99, at 15.

106. ROSE-ACKERMAN, *supra* note 99, at 187.

107. ROGER E. MEINERS & BRUCE YANDLE, REGULATORY LESSONS FROM THE REAGAN ERA: INTRODUCTION 5 (1989). The authors commented that:

The media commonly described Buchanan's contribution as the 'discover' that politicians and bureaucrats work to further their own self-interest. Shallow-minded political commentator's . . . attempted to belittle Buchanan's work by commenting to the effect that any idiot knows that people act in their own self-interest. Actually, economists for years talked, and most political scientists today talk, as if elected and appointed officials do not operate in their own self-interest.

*Id.*

108. See Albert Breton & Ronald Wintrobe, *The Equilibrium Size of a Budget-Maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy*, 83 J. POL. ECON. 195 (1975); Dennis Patrick Leydon & Albert N. Link, *Privatization, Bureaucracy, and Risk Aversion*, 76 PUB. CHOICE (1993).

are the cause of most inefficiency due to their budget-maximizing tendencies.<sup>109</sup> The overall structure of the system creates an environment in which individuals must sacrifice efficiency in order to improve their own situations. The means for these improvements are higher salaries, better perks, more power, and higher importance, all of which equate to a great need for the continual expansion of agencies and their budgets.<sup>110</sup> This incentive structure manifests itself visibly in the relationship between agency administrators and their employees. Both rewards to individuals and the performance of the bureau are dependent upon the agency's budget. Because of this dependence, both administrators and their employees recognize that budget maximization is key to their respective goals.<sup>111</sup>

The incentive structure of bureaucracy encourages agencies to build constituencies or engage in other means of bringing themselves either more money, greater importance, or both.<sup>112</sup> This incentive structure interacts with the self-interest of individuals to

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109. NISKANEN, *supra* note 103, at 102; Robert E. Easton, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 2002 (1990) ("A common theory suggests that the prime motivation for administrative behavior is the desire to accumulate the largest budget or other elements of administrative prestige or independence."). *See also* JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 171 (1986). The author asked:

What do bureaucrats seek to maximize? One answer is provided by W.A. Niskanen, a member of the Council of Economic Advisers in the Reagan administration and a former vice-president of the Ford Motor Company . . . . [B]ureaucrats seek to maximize the size of their agency. . . . [T]he bureaucrat attempts to promote the activities of his bureau in many of the same ways that a firm attempts to increase its size.

....

It is when competition among bureaucrats becomes limited that the bureaucrats' interest and the public interest may diverge most markedly. Niskanen argues that there has been an increasing centralization within the bureaucracy. The attempts to 'rationalize' the bureaucracy, to ensure that two government agencies do not perform duplicative functions, has the disadvantage that it reduces competition.

*Id.*

110. FINIFTER, *supra* note 104, at 387; Ronald N. Johnson & Gary D. Libecap, *Agency Growth, Salaries and the Protected Bureaucrat*, 27 ECON. INQUIRY 431, 431-35 (1989).

111. WILLIAM A. NISKANEN, *BUREAUCRACY: SERVANT OR MASTER?* 24 (1973). He noted that: Profit maximization is also not inherently consistent with higher level goals; in some conditions, it leads to exploiting either consumers, owners of factors, or both. Budget maximization, also, may or may not be consistent with higher-level goals; it can lead to the supply of a valued service or to exploitation.

A bureau's employees . . . indirectly influence a bureaucrat's tenure both through the bureaucrat's personal rewards and through the real and perceived performance of the bureau . . . . The employees' interests in larger budgets are obvious and similar to that of the bureaucrat: more opportunities for promotion, more job security, etc., and more profits to the contract suppliers of factors.

*Id.*

112. William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 618 (1968).

perpetuate the growth of agencies in size and in budget. One writer has noted that members of agencies "act as if they own their positions" and thus use them for their own benefit.<sup>113</sup> The image of the self-interested agency is similar to the feudal system of the Middle Ages. When noblemen bought tax franchises from kings at fixed prices, they were able to maximize their income by taxing the citizens more than they had to pay.<sup>114</sup> The problem involves the inability of bureaucrats to distinguish between their own well-being and that of their agency.<sup>115</sup> In order to increase their salary, perks, and other benefits, bureaucrats must work to increase the factor that most directly affects these variables—the budget of the agency.<sup>116</sup>

Niskanen's model of budget-maximization is widely cited as applicable to all types of public entities.<sup>117</sup> The progression is toward higher budgets in terms of a supply and demand calculus. Bureaucrats create more demand for their services, then require more funding, and then continue to shift their demand curve so as to provide a spiraling growth pattern.<sup>118</sup> That these growth patterns are not efficient in serving the public interest is generally accepted.<sup>119</sup> The effects of the growth pattern and the overall structure are described in the literature on "institutional choice," in which the interests of the public are simply replaced by the interests of the institution, and its individual members.<sup>120</sup> The theory of institutional choice finds that the primary negative factor in any bureaucracy is that it is probably structured in such a way that rational employees are encouraged to act

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113. CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* 14 (1986) ("People tend to act as if they own their positions; they use them to generate income, status, and other things that rightfully belong to the organization.").

114. *Id.* at 15. The author stated that:

During the Middle Ages, the king who wanted revenues from the land and from the people he controlled would sell a tax franchise to someone, generally a nobleman. This official would agree to pay the king a set fee; he was then free to collect as much money as he could from the people and keep anything beyond the set fee.

*Id.*

115. *Id.* at 18 ("The practice of feathering one's nest in large part reflects the problem of separating the interests of the person from the interests of the organization. In our organizational society, this becomes increasingly difficult.").

116. NISKANEN, *supra* note 111, at 294.

117. Dieter Bos et al., *Bureaucratic Public Enterprises*, *ZEITSHRIFT FÜR NATIONALOKONOMIE* SUPPLEMENT 127 (1984) ("The public utility acts similarly to a W.A. Niskanen mixed bureau, maximizing the sum of discounted revenues over the different periods.").

118. NISKANEN, *supra* note 111, at 293, 300.

119. NISKANEN, *supra* note 111, at 36-42; STIGLITZ, *supra* note 109, at 171; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65, 101 (1983) ("Rather than seeking to maximize social benefit, administrators will seek to maximize 'budgets,' 'votes,' or 'power.'"). See generally John A. C. Cronybeare, *Bureaucracy, Monopoly, and Competition: A Critical Analysis of the Budget-Maximizing Model of Bureaucracy*, 28 *AM. J. POL. SCI.* 479 (1984); William A. Niskanen, *Competition among Government Bureaux*, 22 *AM. BEHAV. SCIENTIST* 517 (1979).

120. STIGLITZ, *supra* note 109, at 171.

wrongly.<sup>121</sup> Empirical tests of agency behavior in public service provision support these arguments.<sup>122</sup>

Niskanen's work on incentive structures is not limited to the relationship between the individual employee and the agency. The "incentive structure" is the entire political process. The constraints and opportunities presented to agencies by appropriating bodies, budgeting entities, executives, businesses, and the public, all contribute to the incentive for agency personnel to increase their domain in any way possible. The most important relationship is between the agency and its sponsor—the legislature that provides its appropriations. This relationship is a "bilateral monopoly," in which threats, respect, gaming, and appeals to mutual objectives are common.<sup>123</sup> These characteristics stem from the monopolistic relationship between the legislature and the agency.<sup>124</sup> The legislature, in most cases, cannot obtain the services provided by any one agency from any other, and most agencies cannot fund themselves without appropriations. Agencies become interest groups, lobbying the legislature for favors, especially budgetary ones.<sup>125</sup> Legislative

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121. JACK H. KNOTT & GARY J. MILLER, *REFORMING BUREAUCRACY: THE POLITICS OF INSTITUTIONAL CHOICE* 173 (1987) ("The problem with bureaucracies is that they have structured a system of incentives that guides rational individuals to the wrong behavior.").

122. Richard S. Sterne et al., *Serving the Elderly?—An Illustration of the Niskanen Effect*, 13 *PUB. CHOICE* 81, 90 (1972).

123. See NISKANEN, *supra* note 111, at 113. The author noted that:

A bureau's environment is defined by its relations with three groups: first, the collective organization which provides the bureau's recurring appropriation or grant; second, the suppliers of labor and material factors of production; and third, in some cases, the customers for services sold at a per-unit rate. Of the three, a bureau's relations with its sponsor most strongly distinguishes its environment from that of other forms of organization.

NISKANEN, *supra* note 111, at 13.

124. Niskanen has also stated that:

In the jargon of economics, the relation between the bureau and its sponsor is that of a "bilateral monopoly." As with all such relations (including conventional marriage), this relation is awkward and personal—characterized by both threats and deference, by both gaming and appeals to a common objective. No other type of relation combines threat, exchange, and integrative relations in such equal proportions. . . . The primary difference for the differential bargaining power of a monopoly bureau is the sponsor's lack of a significant alternative and its unwillingness to forego the services supplied by the bureau. Also, the interests of those officers of the collective organization responsible for reviewing the bureau are often best served by allowing the bureau to exploit this monopoly power.

NISKANEN, *supra* note 111, at 14.

125. DOUGLAS YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 65 (1982). The author stated that:

The political nature of bureaucracy is initially revealed in the behavior of administrative agencies acting as interest groups. Administrative agencies operate in a highly charged political environment. They are constantly brought into contact with external groups, both governmental and non-governmental. To retain their power, or to expand, all agencies must maintain a balance of political support over opposition.

*Id.* See also PAUL APPLEBY, *POLICY AND ADMINISTRATION* (1949); FRANCIS E. ROURKE, *BUREAUCRACY*,

reviewers, as well as those in the Executive Branch, serve their own best interests by allowing the agency to take advantage of this monopolistic relationship.<sup>126</sup> Few executives or legislators comprehend completely any one agency's budget or activities. As a result, most budget reviews concentrate only on the increases requested by each agency. The review process, too, requires that "legislators and budget officials depend heavily on the agency for information on its budgetary needs and program intentions."<sup>127</sup> Few can deny that agencies, by controlling the flow of information to the legislature, can influence decisions toward increasing agency budgets.<sup>128</sup>

In addition to the problem of monitoring agency budgets, most legislatures have experienced great difficulty legislating regulation effectively. The tendency over the last few decades has been for a legislature to write more ambiguous statutes, leading to a quasi-legislative duty on the part of agencies.<sup>129</sup> The result of this trend is that agencies might take advantage of their discretion and use it in ways that, politically or financially, benefit the agency more than the public.<sup>130</sup> One writer has even suggested that this tendency is the result of a conscious arrangement between the legislature, agencies, and favored interest groups.<sup>131</sup> Conversely, she observed that the legislature, through the

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POLITICS, AND PUBLIC POLICY (1984); PETER WOLL, AMERICAN BUREAUCRACY 7 (1977).

126. NISKANEN, *supra* note 111, at 14.

127. NISKANEN, *supra* note 111, at 25. The author stated that:

The total activities and budget of most bureaus are beyond comprehensive understanding, so the executive and legislative officers focus most of their review on the proposed increments and reveal their priorities by approving different proportions of them. At every stage of a multistage review process, the review officers are dependent on the bureaucrat to make a forceful case for his proposed budget, in part to determine whether a previous review has made too large a reduction.

NISKANEN, *supra* note 111, at 25.

128. DOWNS, *supra* note 103; TULLOCK, *supra* note 103; Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG.167, 170 (1985) ("[I]nformation about the subject of the regulation[] can convince the legislature to approve a budget larger than necessary to achieve the bureaucracy's regulatory goals, thus resulting in an inefficient use of resources."); Susan Rose-Ackerman, *Comment, Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 346 (1988) ("[R]esearch on the budgetary process shows how an agency's control over program information and over the allocation of funds can be used to increase or maintain budgetary appropriations.").

129. ROSE-ACKERMAN, *supra* note 99, at 33. The author stated that:

Many statutes are ostensibly concerned with improving the efficient operation of the economy but leave considerable discretion to the executive branch. Agencies may exploit the freedom given to them by the Congress to favor narrow groups or to further their own agendas. Given this possibility, I argue that courts should impose a background norm on agency deliberations. The norm I propose is one that respects the costs and benefits imposed on all citizens. In the absence of specific language outlawing policy analysis, courts would require agencies to seek the net benefit maximizing solution. Of course, legislation which explicitly rejects this approach should be upheld. Courts should simply give notice to the legislature that without clear cut language, they will impose a policy analytic test in reviewing economic regulation.

ROSE-ACKERMAN, *supra* note 99, at 33.

130. ROSE-ACKERMAN, *supra* note 99, at 33.

131. ROSE-ACKERMAN, *supra* note 99, at 38. The author stated that:

legislation of deadlines and compliance goals, mandates stricter regulation than can be achieved with allocated agency resources. One example is environmental regulation. Since the 1970s, Congress has given the Environmental Protection Agency (EPA) more and stricter guidelines, but fewer resources for enforcement. The combination of strict goals and deadlines along with a lack of funding allows congressional members to claim credit for proactive legislation, then blame the ineffective results on agency ineptitude.<sup>132</sup>

To better understand the plight of the bureaucrat, one can observe the “treadmill phenomenon.” This phenomena occurs when bureaucrats, striving for higher budgets, make the legislature’s review of the agency’s budgets and activities more difficult, leading to probable increases in further appropriations.<sup>133</sup> In this model, bureaucrats work to increase their budgets until they move on, and then turn over the agency to a fresh bureaucrat, whose interests are, once again, to expand the agency. Although Niskanen did recognize that budget maximization could serve the public interest—through innovative programs or improved services—he suggested that to exploit citizens and firms is just as likely.<sup>134</sup> In reconciling these two possibilities, not all bureaucrats respond to the incentives in the same manner. One may safely conclude, however, that the goal of

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Second, this research implies that statutes may be carelessly or vaguely drafted or constructed to permit subsequent favorseeking. Judicial insistence on net benefit maximization as a default rule can help repair some of the carelessness and can force Congress to be explicit about a state’s narrow focus. It can also constrain an agency from selling out to the groups it oversees. Agency assistance to a narrow group at the expense of greater costs imposed on other would be upheld only if expressly intended by the enabling legislation.

ROSE-ACKERMAN, *supra* note 99, at 38.

132. ROSE-ACKERMAN, *supra* note 99, at 71. The author stated that:

In the regulatory area, conflicts between budgetary stringency and statutory goals are a familiar feature of many current programs. Among those reaching the courts are cases involving the numerous deadlines included in environmental statutes. Deadlines appear to be a politically attractive way to signal that one is serious about the environment. Congress gives voters the impression that it is taking a tough stand without having to do the difficult work of really understanding the problem addressed in the statute. These deadlines are widely ignored. One study found that the Environmental Protection Agency had met only 14 percent of its deadlines. While critics in Congress and the environmental movement blame lack of commitment at the EPA, at least part of the explanation seems to be the low level of appropriations, which makes speed compliance impossible.

ROSE-ACKERMAN, *supra* note 99, at 71.

133. See *infra* notes 137-41 and accompanying text.

134. NISKANEN, *supra* note 111, at 36-77, 127-37, 155-86; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 413 (1989) (“[A]ny agency will exhibit tendencies to maximize its budget or power at the expense of social policy, to minimize its external constraints, and to engage in various other nasty Niskanen behaviors.”); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 885, 886 (1990) (“Bureaucrats do not always maximize general welfare; instead they often allocate goods and services according to personal interest.”).

maximizing the budget is common to all agencies.<sup>135</sup> The most highly recognized administrators are usually those whose budgets have increased substantially.<sup>136</sup>

Other scholars have addressed the issue of self-interested behavior in agencies with considerable diligence. Anthony Downs is particularly well-known for his work, *Inside Bureaucracy*.<sup>137</sup> He had previously argued that agencies must prove their importance in order to survive.<sup>138</sup> In *Inside Bureaucracy*, he further contended that the agency must demonstrate to its funding body that its services are important enough to justify increased monetary support.<sup>139</sup> In addition to this incentive, a desire for qualitative improvements exists because a fast-growing agency can lure more highly qualified, better-educated employees, providing some assurance for future expansion of the agency. Agencies grow in cyclical patterns. One other important cause for agency growth is that it defies the zero-sum nature of agency resources. Most agencies begin with, or experience at some time, a lack of resources, in which any change will necessitate sacrifices among employees. Maintenance of heavy growth obviates these sacrifices by providing additional resources for change, especially for the improvement of personal wealth or status for employees.<sup>140</sup> In this way, growth prevents the agency from having to

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135. NISKANEN, *supra* note 111, at 36-42; Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 64 n.180 (1991) ("Administrators act to maximize their bureaus' budgets . . . . [T]he desire of administrators [is] to increase or protect their budget or their discretion.").

136. NISKANEN, *supra* note 111, at 22-24. The author stated that:

The problems of making changes and the personal burdens of managing a bureau are often higher at higher budget levels, but both are reduced by increases in the budget. This effect creates a treadmill phenomenon, inducing bureaucrats to strive for increased budgets until they can turn over the management burdens of a stable higher budget to a new bureaucrat. Hence an interesting cyclical pattern emerges: bureaucrats interested in making changes resign when budgets are stabilized; their replacements will be satisfied with the other rewards of higher budgets, or strive for further increases, or, possibly, cut the budget in order to provide a basis for further increases. . . . [B]udget maximization should be an adequate proxy even for bureaucrats with a relatively low pecuniary motivation and a relatively high motivation for making changes "in the public interest." This conclusion is supported by the observation that the most distinguished U.S. public servants of recent years substantially increased their budgets.

NISKANEN, *supra* note 111, at 22-24.

137. ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1971).

138. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957). See also NISKANEN, *supra* note 111; Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280 (1990).

139. DOWNS, *supra* note 137, at 7. The author stated that:

No bureau can survive unless it is continually able to demonstrate that its services are worthwhile to some group with influence over sufficient resources to keep it alive. If it is supported by voluntary contributions, it must impress potential contributions with the desirability of sacrificing resources to obtain its services. If it is a government bureau, it must impress those politicians who control the budget that its functions generate political support or meet vital social needs.

DOWNS, *supra* note 137, at 7.

140. DOWNS, *supra* note 137, at 28; Kahn, *supra* note 138, at 312 ("Anthony Downs, for example,

experience some conflicts between members struggling for personal resources.<sup>141</sup> Niskanen has generally agreed with Downs on the matter of self-interested bureaucratic behavior and its usual results.<sup>142</sup>

Other reasons exist for the growth incentives experienced by administrators. High-profile public leaders, such as AGs or commissioners, are under tremendous strain to produce quick and visible results. This pressure, combined with organizational constraints, eventually results in short-cuts, a sacrificing of quality, or unethical behavior.<sup>143</sup> The mere desire to serve the public interest does not ensure that administrators will do so effectively. Self-interested behavior is likely to overtake altruism when resources are tight.<sup>144</sup>

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assumed that politicians 'act solely in order to attain the income, prestige, and power which come from being in office.'").

141. DOWNS, *supra* note 137, at 17. The author stated that:

The major reasons why bureaus inherently seek to expand are as follows: An organization that is rapidly expanding can attract more capable personnel, and more easily retain its most capable existing personnel, than can one that is expanding very slowly, stagnating, or shrinking. This principle was examined in the preceding section. . . . The expansion of any organization normally provides its leaders with increased power, income, and prestige; hence they encourage its growth. . . . It implies that the leaders of any given organization can normally increase their power, income, and prestige by causing their organization to grow larger . . . . Growth tends to reduce internal conflicts in an organization by allowing some (or all) of its members to increase their personal status without lowering that of others.

DOWNS, *supra* note 137, at 17. See William J. Baumol, *On the Theory of Expansion of the Firm*, 52 AM. ECON. REV. 1078 (1962).

142. Dan B. Wood, Review, in THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 87, 113 (Andre Blais & Stephane Dion eds., 1993).

143. DOWNS, *supra* note 137, at 72. The author stated that:

The pressure to produce results quickly will sooner or later cause him to use short-cut methods of dubious quality. In many cases, such methods are entirely appropriate to the situation, but they would be difficult to justify in public later when the exigencies of the moment are no longer visible. . . . [N]o leader of any large organization can avoid undertaking acts he does not want made public.

DOWNS, *supra* note 137, at 72.

144. DOWNS, *supra* note 137, at 87. The author stated that:

Although many officials serve the public interest as they perceive it, it does not necessarily follow that they are privately motivated solely or even mainly by a desire to serve the public interest per se. If society has created the proper institutional arrangements, their private motives will lead them to act in what they believe to be the public interest, even though these motives, like everyone else's, are partly rooted in their own self-interest. Therefore, whether the public interest will in fact be served depends upon how efficiently social institutions are designed to achieve that purpose. Society cannot insure that it will be served merely by assigning someone to serve it.

DOWNS, *supra* note 137, at 87.

### C. *Self-Interest and the Regulatory Agency*

To add to the evidence for individual incentives to make agencies grow, much effort is devoted to other financial incentives that can drive agency policies in relation to growth. These incentives in particular are quite applicable to regulatory agencies. In describing the relationship between agencies and the public, the effort that an agency puts into serving the public will depend on the relationship between that service and the agency's income. If no relationship between the outputs of the agency and its income exists, then agency behavior will not serve the public. In a regulatory agency where income might be extracted from business or industry, this relationship dictates that agencies are likely to be quite interested in performing their duties of regulation,<sup>145</sup> whether or not the performance of these duties serves the interests of the public.<sup>146</sup>

The amount of discretionary revenue spent to benefit the growth of an agency can prove to be a key component of budget-maximizing behavior in the agency.<sup>147</sup> Similar to the reinvestment of discretionary revenue in private firms, agencies and their employees enjoy improved status or pay from the maximization of discretionary revenues. That most bureaucrats desire increased budgets is commonly accepted.<sup>148</sup> In an agency where regulation can affect the amount of discretionary revenue, employees are most likely to do what they can to serve their own interests by maximizing discretionary revenues.<sup>149</sup> While this self-interested behavior improves the standing of the agency and the individuals within, it is likely to impose undue costs on the public. When explaining self-interested behavior in regulation, scholars generally seek a motive to which they can attribute bureaucratic decisions. They often point to regulation which may serve the

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145. NISKANEN, *supra* note 111, at 19. The author stated that:

In bureaus, the attention to customer interests depends on the addition to the total financing (revenue) that originates in the sale of a service; in profit seeking firms, this attention depends on the attention to total profits. A bureau whose sponsor is willing to compensate for any loss of revenues from sales, or that is a monopoly supplier of a service with a nearly fixed demand, will usually be quite indifferent to the interests of its customers, even if a large proportion of the total financing its from sales revenues.

NISKANEN, *supra* note 111, at 19.

146. This proposition is contrary to the prevailing view that agencies are coopted by the people they regulate through the medium of special interest groups. See generally Margaret G. Farrell, *Doing Unto Others: A Proposal for Participatory Justice in Social Security's Representative Payment Program*, 53 U. PITTS. L. REV. 883, 948 (1992); Louis L. Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201, 252-53 (1937); Thomas L. McGovern, III, Note, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1499 (1987); George J. Stigler, *The Process of Economic Regulation*, 17 ANTITRUST BULL. 207 (1972). It is, however, in keeping with the maxim that, to misquote Benjamin Franklin, the law helps those who help themselves.

147. Barry M. Mitnick, *The Theory of Agency: The Policing "Paradox" and Regulatory Behavior*, 24 PUB. CHOICE 27 (1975).

148. Rubin, *supra* note 135, at 1; Wood, *supra* note 142, at 113.

149. Mitnick, *supra* note 147, at 37.

public interest, but more directly serves the interest of a particular industry or business, usually at some cost to consumers or competition.<sup>150</sup>

This known existence of ulterior motives sometimes casts a dark shadow over the study of regulatory agency behavior. The decision rules and guidelines that determine priorities in regulatory enforcement policy can often be particularly secretive, or at least superficial in that they do not reflect the true intent of many agency actions. One writer has noted that few agencies promote careful outside studies of their decision rules. Reasons for this tendency have been posited, but most are speculative. Agencies feel that their priorities and procedures are sufficient, or they prefer to remain blissfully ignorant as to the effectiveness of their actions. Consider also that the agency may be aware of problems, but has no desire to alleviate them. Perhaps the worst possibility is that the agency knows that there are serious problems or unethical motives behind its procedures, and it does not want these motives to be exposed to other agencies, the legislature, or the public.<sup>151</sup>

When one attributes self-interested behavior to a regulatory agency, the most serious implication is not only that this behavior is likely to be inefficient in terms of serving the public, but also that the costs imposed upon the regulated are unfair, and will probably be passed on to the public. The literature on incentives for regulatory behavior clearly states that few regulatory agencies are likely to find adequate incentives for efficient and unbiased regulatory enforcement in the current political environment.<sup>152</sup> This conclusion not only defies the public choice model for efficient agency behavior; it also presents new problems in terms of the control of agencies and the ability for government to regulate efficiently.

In order to maintain equilibrium among competing interests that must be pacified, most administrators will find growth to be the easiest and most harmonious route for defeating zero-sum criteria. The results of this type of behavior are widespread and visible. Agency decisions often favor consumers who are more affluent or politically active. More often, they favor larger, more established firms by preventing smaller firms from entering into the market. In addition, agency decisions tend to promote long-term growth in the industry, and emphasize the need for more and larger programs for compliance. The result is that more resources will be expended in the future, assuring a larger piece for the agency and its employees.<sup>153</sup> This tendency is reflected in the

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150. ROBERT E. MCCORMICK, A REVIEW OF THE ECONOMICS OF REGULATION: THE POLITICAL PROCESS, ROGER E. MEINERS & BRUCE YANDLE REGULATION AND THE REAGAN ERA 28 (1989). The author stated that:

There is abundant evidence in the economics literature that when the flag of public interest is raised to support regulation, there is always a private interest lurking in the background. There is hardly a regulatory program anywhere that does not benefit some industry or subset, most often at the expense of rivals or consumers.

*Id.* at 28.

151. WESLEY A. MAGAT & STEVEN ESTOMIN, THE BEHAVIOR OF REGULATORY AGENCIES, ATTACKING REGULATORY PROBLEMS 97 (1981).

152. *Id.*

153. Milton Russell & Robert B. Shelton, *A Model of Regulatory Agency Behavior*, 20 PUB. CHOICE 47, 49-59 (1974); see Meredith Associates, *Report to the Chairman of the Federal Trade Commission: False-Advertising Law and Policy under FTC Administration*, in THE FEDERAL TRADE COMMISSION SINCE 1970:

behavior of the agency, which responds to the prevailing incentive structure by working continuously to increase the demand for agency activities.<sup>154</sup>

Agencies, in general, prefer policies that serve to increase their budgets or advance members in their careers.<sup>155</sup> Because of these trends in agency behavior, many economists and analysts have written off regulation as a political tool for self-interested individuals rather than as the result of a collective decision-making process.<sup>156</sup>

#### *D. An Empirical Example: The Federal Trade Commission*

In order to bring the preceding discussion "down to earth," examination of a real agency—the Federal Trade Commission (FTC)—will be helpful. In terms of self-interested regulatory enforcement, the most interesting component of FTC activities are those related to deceptive advertisement. This discussion addresses enforcement of deceptive advertisement regulations and traces the growth patterns and bureaucratic behavior of the FTC.

The FTC has been involved in regulating deceptive advertisement for most of the twentieth century. The decision rules for this enforcement, as well as the actual enforcement behavior, have changed considerably over the years. In the 1970s, the FTC concentrated much time and energy on the activities of smaller companies in very competitive businesses, dwelling on "petty matters and minor infractions."<sup>157</sup> The problem is that the FTC had previously relied upon information provided by businesses on the activities of their competitors for their enforcement agendas. Thus, small companies in highly competitive industries were subject to an unfair majority of

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ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 56 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) [hereinafter THE FTC SINCE 1970]. The Report provides:

Initial compensation for attorneys and other key employees in the lower and medium levels is competitive with comparable positions outside the FTC. The maximum level for salary growth, however, is limited, and is usually quickly reached, causing the turnover rate of FTC attorneys to nearly double that of private law firms.

The Civil Service Commission further constrains the FTC with its authority to disapprove any supergrade (GS-16 or above) positions. Such approval is often denied, causing the Commission to lose qualified people whom it is unable to promote or cannot hire from the outside at the position and salary it desires.

*Id.*

154. Randall G. Holcombe & Edward O. Price, III, *Optimality and the Institutional Structure of Bureaucracy*, 33 PUB. CHOICE 1, 55-59 (1978) ("[A] supply-demand analysis is used to develop an incentive system. The supply conditions faced by a bureaucracy are not unusual; however, a bureaucracy acts as if it were faced with an all-or-nothing demand curve.").

155. DENNIS C. MUELLER, PUBLIC CHOICE 156-70 (1979); NISKANEN, *supra* note 111; Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (April 1990) ("[G]overnment agencies . . . skew the policy agenda in favor of maximizing the agency budget or furthering its bureaucrats' career goals.").

156. ROSE-ACKERMAN, *supra* note 99, at 15.

157. ALAN STONE, ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE 53 (1977).

complaints.<sup>158</sup> Advertisers claimed that large firms were less likely to receive FTC attention because they did not participate in much deceptive advertising. According to advertisers, knowledge of deceptive advertising discourages repeat customers, which is very damaging financially to a large, nationally advertised firm.<sup>159</sup>

Efforts were made during the Nixon administration (after exposés by Ralph Nader and his associates) to improve the efficacy of FTC deceptive trade enforcement,<sup>160</sup> but few scholars note any significant improvements in advertising during the 1970s.<sup>161</sup> The circumstance remains, no matter what the policy stance, that the FTC cannot expend the resources required to monitor all advertising. The result is that spot-checks and complaints are the primary means of detecting deceptive advertising.<sup>162</sup> Since the FTC continues to spend a good part of its time dealing with complaints from business and industry, the items in question do not necessarily affect consumers directly. Rather, they are those to which businesses object because of the possibility of an unfair advantage.<sup>163</sup>

The unfortunate result of this tendency is that the Commission might devote its attention to any claim, as long as some support is provided. Businesses that wish to protect their market share are then compelled to watch for any encroachment, or hint thereof, and find a reason to call the competitor's advertisement deceptive. Whether the matter has any serious implications for consumers is not as important as who lodges the complaint and whether or not it can be shown as actionable.<sup>164</sup>

In the early 1970s, the prevalent policy directive for the FTC was to prosecute any advertisement that had a "tendency or a capacity to deceive."<sup>165</sup> In enforcing this directive, the agency did not concern itself with the well-being of the majority of the people. Moreover, the effort effectively increased the scope of the agency's mission, so the FTC was, according to the rule, justified in taking action against any advertisement that could be misinterpreted. The support from the courts on this type of enforcement was largely dependable. As a result, advertisers had to take extreme caution when formulating advertising claims. No clear standard for the determination of deception remained, and the agency could call any claim deceptive at its discretion. In this way, enforcement of the Federal Trade Act might have kept useful information from consumers, injuring them in yet another manner.<sup>166</sup>

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158. *Id.* at 68.

159. See *id.* at 166; Tom Dillon, *What Is Deceptive Advertising?*, 13 J. ADVERTISING RES. 10 (1973).

160. See EDWARD COX ET AL., "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969).

161. STONE, *supra* note 157, at 169-170.

162. STONE, *supra* note 157, at 173.

163. STONE, *supra* note 157, at 173; COX ET AL., *supra* note 160, at 16.

164. STONE, *supra* note 157, at 183.

165. THE FTC SINCE 1970, *supra* note 153, at 39.

166. THOMAS F. WALTON & JAMES LANGENFIELD, REGULATORY REFORM UNDER REAGAN—THE RIGHT WAY AND THE WRONG WAY, REGULATION AND THE REAGAN ERA 77-78 (1989). The authors noted that:

[Federal Trade Commissioner] Miller initially attempted to have Congress pass a definition of deception, so that advertisers would better know what constituted an illegal act and truthful advertisements would not be deterred. Specifically, he sought to clarify the guidelines by explicitly requiring consumer injury to be demonstrated; that a representation, omission, or practice should be likely to mislead consumers; and that the commission rely more on empirical evidence than its own

In analyzing the incentive structure for FTC employees, three entities hold influence over the FTC: small companies, who want protection from larger ones; big industry, which lobbies heavily to prevent small companies from entering the market; and, the staff of the FTC itself.<sup>167</sup> While the inclusion of small businesses and big industry in this set is somewhat intuitive, the mention of FTC staff brings the discussion back to the organizational self-interest of agency employees.

Both FTC lawyers and FTC economists are strong lobbyists for agency expansion and rule complication.<sup>168</sup> Lawyers are seen as encouraging further complexity and the promulgation of increasingly more difficult rules, while economists are seen as desiring more complex policy directives. Although no one proposed that either group actively seeks out these activities, one writer stated that in no case will either seek to simplify or economize operations at the FTC.<sup>169</sup> Other scholars have found FTC staff to show an affinity for expansion.<sup>170</sup> This conclusion represents consensus on the matter of incentives for agency expansion. One writer has asserted that this tendency is closely related to the ideology (usually liberal) of agency employees.<sup>171</sup> Moreover, regulatory agency staff tend to favor regulation in general. The EPA, for example, is known for employing environmentalists.<sup>172</sup>

From 1973 to 1976, sixteen new trade regulation rules were developed under Section 5 of the Federal Trade Act. These rules significantly broadened the authority of the commission, and resulted in a budget increase from \$21 million to \$70 million between 1970 and 1979.<sup>173</sup> Self-interested expansion seems apparent. Similar motivations for

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expertise. . . . Eventually a majority of commissioners voted for the policy statement.

*Id.*

167. TULLOCK, *supra* note 103, at 336.

168. TULLOCK, *supra* note 103, at 336.

169. TULLOCK, *supra* note 103, at 336-37.

170. Timoth J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 184 (1986).

171. Wood, *supra* note 142, at 114.

172. WILLIAM LILLEY, III & JAMES C. MILLER, III, *THE NEW SOCIAL REGULATION, PUBLIC POLICY: ISSUES, ANALYSIS, AND IDEOLOGY* 221 (1977). The authors stated that:

Regulatory agencies tend to lure personnel who "believe" in regulation. It is not surprising, for example, that EPA has a reputation for having a staff composed largely of "environmentalists" (just as ICC is staffed principally by people who disagree strongly with those economists who argue that the transportation sector would be much more efficient without regulation). Moreover, abetted by the civil service system, regulatory agencies tend to be staffed by people who are risk-averse, very security-conscious about their jobs, and unwilling to take initiatives they fear may conflict with the agency's "mission." These tendencies are reinforced by actual on-the-job incentives to produce inefficient regulation.

It has been our experience that, particularly in the area of social regulation, many officials behave as though driven by a desire to "punish" a transgressor.

*Id.*

173. WILLIAM C. MACLEOD & ROBERT A. ROGOWSKY, *CONSUMER PROTECTION AND THE FTC DURING THE REAGAN ADMINISTRATION, REGULATION AND THE REAGAN ERA* 72 (1989). The authors noted that:

More creative interpretation of the unfairness doctrine of Section 5 of the Federal Trade Act led to

individuals in the FTC to further the activities of the agency are cited, such as increases in private legal fees as being attractive to FTC attorneys and increases in caseload and theoretical questions as being beneficial to economists.<sup>174</sup>

Recognizing the FTC as a budget-maximizing entity and desiring more tangible standards for deceptive advertising, policy makers in the Reagan Administration wrote a new policy statement for deceptive trade. It stated that in order to be actionable, a matter must be injurious to the consumer, likely to mislead, and both of these qualities must be empirically demonstrable.<sup>175</sup> Despite new and stricter guidelines for application of the deception rule, much useful information is prevented from entering the market. Reduction of profits harms advertisers, prevention of trade damages firms, and denial of useful information harms consumers. The only beneficiaries, outside of the FTC, of this type of enforcement are the larger firms, who are less susceptible to the costs of enforcement than are smaller firms.<sup>176</sup>

In the extensive literature on individual incentives for FTC employees, growth continues to be the key to almost any problem. In addressing questionable complaints, for example, employees tend to refer to the resources already sunk into the investigation. Not wanting to admit defeat or to "waste" sunken resources, agency staff tends to refuse to drop a questionable action. Moreover, dropping a questionable action would mean giving up an opportunity to further expand the functions of the agency.<sup>177</sup> This tendency

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the initiation of sixteen major trade regulation rules during the 1973 to 1976 chairmanship of Lewis Engman. . . . Although this broad reach of the commission's authority was questioned, these rules, designed to transform practices of entire industries, formed a major regulatory front for the agency. To handle the increased activity, the agency's budget grew from about \$21 million in 1970 to nearly \$70 million in 1979.

*Id.* See generally COX ET. AL, *supra* note 160 (discussing the FTC through the late 1960s).

174. THE FTC SINCE 1970, *supra* note 153, at 300, provides:

Third, increases in private legal fees spent to litigate FTC issues enhance the marketability of FTC employees, at least to the extent that current increases raise the probability of future higher fees. Budget increases further this goal. Moreover, private fees probably rise, all else equal, when the FTC pursues more projects with multiple respondents, as with the 1970s emphasis on rule making and the market concentration doctrine.

175. WALTON & LAGENFIELD, *supra* note 166, at 47; Gary T. Ford & John E. Clafee, *Recent Developments in FTC Policy on Deception*, 50 J. MARKETING 82 (1986).

176. Richard S. Higgins & Fred S. McChesney, *An Economic Analysis of the FTC's Ad Substantiation Program*, in *EMPIRICAL APPROACH TO CONSUMER PROTECTION ECONOMICS* (Pauline M. Ippolito & David T. Scheffman eds., 1986).

177. THE FTC SINCE 1970, *supra* note 153, at 291-299 notes:

When a complaint is issued or a rule proposed, the amount of resources already spent plays a key, albeit perverse, role. Rather than realizing that past costs are sunk and therefore irrelevant to current decisions, the opposite notion prevails, reflecting distaste for "wasting" already spent resources. Indeed, the staff evokes this attitude, asking how the Commission could discard years of work. Further, the staff now has a vital stake in a "yes" vote. With a "no" vote, staff members, who must have litigation experience to maximize their value in this job market, see their investment in a good prospect lost. Thus, faced with a yes or no decision, the commissioners are under great pressure to say yes.

is closely related to Niskanen's claim that bureaucrats are risk-averse and will prefer low-risk financial gains over high-risk endeavors.<sup>178</sup> These factors are all closely related to the functions of utility-maximization and budget expansion discussed previously in this Article.<sup>179</sup>

This examination of FTC procedures provides empirical evidence for the proposition of self-interested actions of agency individuals in relation to expansion and relations with regulated firms. Much of the rational, self-interested behavior and the incentive for individual self-proportion generally attributed to agencies is seen in the FTC. In these categories, the FTC fits the mold of the self-interested, predatory regulatory agency. However, little has been said about the FTC and its relations with the courts.

The courts, over the years, have been generally favorable toward the FTC's efforts to grow. As early as the 1930s, the courts were confirming the right of the Commission to regulate deceptive trade, whether consumers are harmed or not.<sup>180</sup> One outstanding dissent to this judicial support notes that the probable beneficiary of this liberal enforcement is typically not the average citizen.<sup>181</sup> As stated, the typical beneficiary

has a short attention span; he does not read all that is to be read but snatches general impressions. He signs things he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid bills. Most of all, though, he is thoroughly avaricious. Fortunately, while he is always around in substantial numbers, in his worst condition he does not represent the major portion of the consuming public.<sup>182</sup>

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Of many possible preferences (*i.e.*, sources of utility), we discuss two that are often complementary, one for power, the other for wealth. Both are available within existing FTC constraints. A person's preference for power manifests itself in a desire to reshape society in his or her own image. An individual with this preference will be attracted to organizations that lack the discipline of profit or other stringent constraints.

178. John R. Gist & R. Carter Hill, *The Economics of Choice in the Allocation of Federal Grants: An Empirical Test*, 36 PUB. CHOICE 1, 63 (1981) ("[T]he Niskanen budget maximization hypothesis . . . [posits that] bureaucrats attempt to avoid risky projects and select financially successful ones.").

179. DOWNS, *supra* note 137; TULLOCK, *supra* note 103.

180. THE FTC SINCE 1970, *supra* note 153, at 37 ("[I]n the 1934 decision of *FTC v. Algoma Lumber Co.* . . . the Court implied that whether or not consumers were harmed, the FTC was correct to consider the practice to be corrupting and injurious." Citing 291 U.S. 67, 76 (1934).).

181. THE FTC SINCE 1970, *supra* note 153, at 38. Justice Black argued that:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

THE FTC SINCE 1970, *supra* note 153, at 38 (referring to *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937), *cert. denied*, 305 U.S. 642 (1938)).

182. THE FTC SINCE 1970, *supra* note 153, at 38-39 states:

As to the standard of deception, the courts eased the FTC's burdens considerably by concluding that

One writer has noted that the sort of unbridled authority and discretion enjoyed by the FTC is not conducive to prudent regulation.<sup>183</sup>

Overall, however, the support of the courts is substantial and widespread. Several years passed during which the FTC lost no Federal Trade Act Section 5 cases because of a practice being non-actionable.<sup>184</sup> In addition, the courts allowed FTC functions to expand into corrective advertising and advertising substantiation.<sup>185</sup> Finally, the courts have supported the right of the Commission to levy back-payments for deceptive advertising.

#### *E. The New Federalism and State Agency Preclusion*

During the 1980s, the Reagan administration, in an effort to decrease the influence of the national bureaucracy and improve accountability and efficiency, implemented several programs aimed at decentralizing public administration in general. Much of the responsibility for regulatory enforcement and service provision shifted to state and local governments, and stricter rules on federal funding for lower levels of government were established.<sup>186</sup> If one were to apply Niskanen's model and subsequent findings on regulatory behavior to the state-level counterparts of federal regulatory agencies, the difference in political scale would result in reliance on outside funding, and more incentives for self-interested regulatory behavior.<sup>187</sup>

For a national firm to deal with a state agency operating under these conditions is a risky endeavor at best. Add to this the burden of complying with federal rules as well as

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actual deception was unnecessary; instead, the FTC need only show a "tendency or capacity to deceive." Coupled with the standard for judicial review of Commission actions—a Commission finding would be affirmed if supported by substantial evidence on the record—this test for deception made it virtually impossible to reverse Commission findings of deception.

*See* George J. Alexander, *Honesty and Competition: False-Advertising Law and Policy Under FTC Administration*, 8 SYRACUSE UNIV. PRESS 8 (1967).

183. NISKANEN, *supra* note 111, at 36-42; Ernest Gellhorn, *Trading Stamps, S & H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 955 ("[U]nconfined authority generally leads to its use.").

184. THE FTC SINCE 1970, *supra* note 153, at 44 provides:

The Commission did not lose (even partially) a single case because the practice under question was not an unfair method of competition or an unfair or deceptive act or practice within Section 5. Further, the courts affirmed important expansions of Commission authority, such as corrective advertising and advertising substantiation. Third, the courts continued to affirm antitrust cases under a Section 5 theory when it was not clear that the Commission would win under a pure antitrust theory. Finally, prohibition of a merchandising claim that probably few, if any, consumers would misunderstand was upheld in 1974 despite a strong attack by a dissenting circuit court judge and a dissenting commissioner that the problem was too trivial for FTC concern and that there was no proof of public injury.

185. THE FTC SINCE 1970, *supra* note 153, at 44.

186. THE FTC SINCE 1970, *supra* note 153, at 160 ("Cuts in federal grant assistance to state regulators accompanied the increased emphasis on state-level implementation. In contrast, other policies worked against decentralization by preempting state government regulations and mandating lower-level governments to act in particular ways.").

187. THE FTC SINCE 1970, *supra* note 153, at 163.

forty-nine other state agencies, and a small or moderately-sized national business will be swamped with rules, confusing precedents, and numerous threats of adjudication. One writer has suggested that this predicament is largely a result of lobbying efforts by larger companies, leading to effective barriers to entry for smaller companies.<sup>188</sup> Interviews with corporate leaders show that many prefer uniform federal rules over sporadic and unpredictable state regulation. In fact, businesses would rather work "with one federal gorilla than 50 state monkeys."<sup>189</sup> The prevalence of strict state regulation, especially when dealing with small and out-of-state businesses, leads to a very strong conclusion that state agencies participate in regulation that protects local, or larger and more influential businesses by preventing others from competing effectively.<sup>190</sup> Unfortunately, much of the regulation that is accomplished today is done so not through uniform policy making, but through "concentrating on a few squeaky wheels."<sup>191</sup>

The lessons learned from the FTC and state agencies are hard and discouraging. The public choice model, while ambitious in its prescriptions, is reasonable in its intent. Agencies created by the people to improve the general welfare should not hold as a

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188. THE FTC SINCE 1970, *supra* note 153, at 163.

189. THE FTC SINCE 1970, *supra* note 153, at 173 provides:

Therefore, in areas without absolute federal preemption, efficiency may sometimes require an active federal agency that establishes uniform rules. Corporations are often on the side of federal uniformity rather than interstate diversity and competition. One business critic claimed that the new federalism resulted in a "state regulatory nightmare, a 50-headed hydra." Another, using equally colorful language said, "I would rather deal with one federal gorilla than 50 state monkeys." Firms that sell in national markets (e.g., railroads, trucking, and telecommunications) and compete with local firms in some markets (e.g., supermarket chains and producers of beer, mineral water, dairy products, or prefabricated houses) will often prefer national regulation. Even if a firm's bargaining power is high in most states, the benefits of uniform national laws may outweigh the costs resulting from a higher average level of regulation. If state and local laws seem designed to protect local businesses rather than reflect genuine differences in tastes across jurisdictions, the federal government should take a hard look to determine the possible interference with interstate commerce.

190. THE FTC SINCE 1970, *supra* note 153, at 173.

191. THE FTC SINCE 1970, *supra* note 153, at 191 provides:

My hunch is that, at the federal level, most real progress can be made in the reform of social, as opposed to economic, regulation. In the area of social regulation, statutes should emphasize agency rulemaking rather than adjudication as the preferred method of rulemaking rather than adjudication as the preferred method of settling general policy. The administrative process should be streamlined so that agencies institute broad-based policies of wide coverage rather than concentrating on a few squeaky wheels.

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[There are plans to] impose budgetlike constraints on those agencies that make few demands on the Treasury but that nevertheless may impose large costs on the private sector. I oppose these proposals because they suffer from a failure to incorporate benefits and focus undue attention on the costs of regulation. Although some regulatory statutes, agency rules, and judicial decisions have certainly gone too far in overemphasizing benefits and ignoring costs, that is no excuse for going in the opposite direction. Both the costs and the benefits of regulations are largely outside of the federal budget and are therefore unconstrained by the check-writing ability of the treasury.

primary goal their own expansion and ornamentation.<sup>192</sup> Yet another negative observation is that these findings can most likely be applied to state and local regulatory agencies with similar results. The federal system, as practiced in the United States, allows for regulatory activities at the state level that are quite similar to those practiced nationwide by federal agencies. The imposition of numerous state agencies on businesses and consumers, in addition to the costs of dealing with the federal bureaucracy, is a frightening reality.

#### IV. PREDATORY BEHAVIOR BY STATE ATTORNEYS GENERAL

Because of the predatory incentive structure created by the funding system, many state AGs develop an entrepreneurial spirit with respect to litigation, feeding from the entities they regulate. In effect, these state agencies have become bounty hunters.

An example of predatory behavior by state AGs is the way they apply their states' DTPAs<sup>193</sup> discriminatorily<sup>194</sup> against out-of-state companies. The archetype of this discrimination is the handling of claims involving deceptive trade practices claims by out-of-state companies doing direct mail business in all fifty states.<sup>195</sup>

Such companies send the same mailings to at least forty-eight foreign states.<sup>196</sup> They are subject to the deceptive trade practices laws of those states. Because those laws are substantially uniform, a direct-mail company that violates the deceptive trade practices law of one state probably violates the laws of many, if not all, of the other states.<sup>197</sup> Just because a company has been shown not to violate one state's DTPA, however, does not deter a second state's AG; each state's AG gets a "bite at the same apple."

A state AG can take advantage of the uniformity of deceptive trade practices laws by tracking the companies being sued in other states,<sup>198</sup> and approaching those companies with a threat to sue<sup>199</sup> in the AG's state unless the companies do not settle.

For example, if a Delaware direct-mail company, with its principal place of business in New York, is being sued in Mississippi under the Mississippi deceptive trade practices

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192. FINIFTER, *supra* note 104, at 387.

193. All states have legislation forbidding deceptive trade practices. See David Benjamin Lee, Note, *The Colorado Consumer Protection Act: Panacea or Pandora's Box?*, 70 DENV. U. L. REV. 141, 143 (1992).

194. In general, states may not discriminate against interstate commerce. D.H. Holmes Co. v. McNamara, 486 U.S. 24, 29 (1988).

195. See *supra* text accompanying notes 15-16.

196. A foreign state is any state in which the company is not a citizen. Because a company is a citizen only of its state of incorporation and of its principal place of business, a company will always have 48 (and sometimes 49) foreign states.

197. This is not a "uniformity" problem because the state statutes under which the AGs are threatening suit are substantially the same from state to state. See Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 106-09 (1988-89) ("Outside the peculiar field of transportation[,] . . . the [D]ormant Commerce Clause does not, in the name of uniformity, prohibit the states from taking differing approaches to problems that exist in every state.").

198. The National Association of Attorneys General has a consumer protection division to help AGs track consumer actions in other states. *AGs in 10 States Take More than 70 Consumer Actions*, 1993 Antitrust & Trade Reg. Rep. (BNA) No. 1638 at 591 (Nov. 4, 1993).

199. See *infra* notes 202-04.

statute,<sup>200</sup> the AG of Missouri may approach the company and offer to settle Missouri's potential suit against the company, for the same allegedly deceptive practice but under Missouri's statute,<sup>201</sup> for \$50,000.

Because the company does no business in Missouri except through the mail and common carriers, the cost of preparing a defense against the Missouri claim is greater than the settlement offer. Even if the company has not engaged in any deceptive practices, for the company to accept the Missouri settlement and avoid litigation expenses is rational.<sup>202</sup>

This behavior by the state's AG discriminates against companies that do interstate business because they are the only ones that are susceptible to suits by foreign AGs. A company will rationally settle for any amount less than the nuisance value of defending a suit. Purely intrastate companies are covered by their home states' DTPAs. Therefore, the cost of defending will be lower for them (because they can only be sued in their home states) than for out-of-state VMCs. AGs can extract more money from corporations to which prospective suits have more nuisance value. Therefore they will naturally choose to go after those VMCs without local representation.<sup>203</sup>

The company's problems are compounded by the fact that there are forty-eight more predatory AGs eager to cash in with similar settlement offers. In each case the AG will ask for something less than the amount it would cost the company to prepare for litigation, and in each case the company would be well-advised to pay.<sup>204</sup>

This pattern could result in direct mail companies being forced to pay millions of dollars to avoid suits in all fifty states. These potential litigation costs will make the venture *ex ante* unprofitable, especially since a company cannot know what practices will

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200. MISS. CODE ANN. § 75-24-1 (1991 & Supp. 1994).

201. MO. REV. STAT. § 407.010 (1990 & Supp. 1994).

202. "A rational party should settle only if it can obtain at least what it would achieve by proceeding to trial and verdict, taking into account all of the economic and noneconomic costs of both settlement and trial. . . . The point where a party is indifferent to whether the case goes to trial or settles is the party's break-even point, or reservation price." Peter T. Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 3. Settlement can only occur where the plaintiff's reservation price is lower than or equal to the defendant's, *i.e.*, where the plaintiff expects to gain less from trial than the defendant expects to lose. The difference between the parties' break-even points is known as the parties' bargaining range. If there is no bargaining range, the parties will not settle. *Id.* at 5.

203. The break-even point, or reservation price, for a local company will be lower than for an out-of-state company because the cost of defending against a suit will be lower for the former than for the latter. The break-even point for a state AG will be approximately the same in a suit against a local company as in a suit against an out-of-state company.

Because the in-state company's break-even point will be much lower than the out-of-state company's (assuming the same potential liability for both), the out-of-state company will be willing to pay more to avoid litigation, and so will be worth more to the state AG.

The increased value of out-of-state companies to AGs makes them the logical targets for threatened suits under consumer protection statutes. Because they are more likely to be hit up by AGs for protection money, out-of-state companies suffer a significant detriment from the behavior of the state AGs.

204. An extreme version of this problem would be suits by threatened AGs acting in bad faith—threatening deceptive trade practices litigation, with no reason to believe there is a violation, only to collect protection money from a company.

be considered deceptive until it is too late. Interstate companies are being discriminated against on a grand scale because, unlike local companies, they can be crushed by these settlement demands. The kind of burden on interstate commerce foretold by Justice Holmes occurs when the company has not in fact engaged in the deceptive practices with which it is charged.<sup>205</sup>

Therefore, the predatory environment conflicts with Commerce Clause values by interfering with interstate commerce and discriminating against out-of-state companies. VMCs have to deal with different regulatory actors in every state, making interstate business more like international business and violating the spirit of the entire Constitution.

The added burden on companies trying to do multistate business is an impossible situation. It destroys the ideal of an open national market, and makes interstate business much more expensive<sup>206</sup> and difficult.<sup>207</sup> Companies cannot, and should not have to, pay a state-by-state toll on the highway of interstate commerce, yet the national incentive statute has created exactly that result.

## V. DELIVERING VMCs INTO THE LIGHT

One solution to the problem of predatory suits would require that, once one state has begun an action against a company, other states must refrain from bringing actions for the same behavior. It would also require that, if the company is exonerated in the first suit, other states be bound by the Full Faith and Credit Clause of the U.S. Constitution.

For the discussion in this Article, the "primary suit" is the first suit instituted against the company for a particular allegedly deceptive practice. The plaintiff in the primary suit is the "primary state." "Secondary suits" are suits by other states, inspired by the primary suit. These states are "secondary states."

### A. Preemption

The first possible solution to the problem of predatory suits is to find the states' DTPAs preempted. The five possible ways a state law may be preempted by federal law are: (1) explicit preemption; (2) pervasive federal regulation leaving no room for state regulation; (3) dominant federal interest; (4) federal regulations that reveal a congressional purpose to preclude enforcement of state law; or (5) conflict with federal law.

In the case of interstate commerce, preemption can be accomplished by an act of Congress. "It is well-settled law that Congress may regulate any activity, however local in nature, if it rationally finds that the activity affects interstate or foreign commerce in

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205. *See supra* note 1 and accompanying text.

206. *But see* *Frontier Fed. Sav. & Loan v. National Hotel Corp.*, 675 F. Supp. 1293, 1299 (D. Utah 1987) (The defendant engaged in interstate business is acquainted with and therefore able to bear the burden of out-of-state litigation.); *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989) (Even a small corporation may not be inconvenienced by going to another part of the country to litigate.).

207. This is comparable to the field of employees' retirement benefits, in which Congress concluded that "the burden of complying with regulation is so heavy that parties should have to follow only one set of laws," and expressly preempted state laws. *Wolfson, supra* note 197, at 73. The chief difference is, of course, that in the present case Congress has not explicitly preempted state deceptive trade practices laws.

any discernable way.”<sup>208</sup> Several federal statutes could be found to preempt actions against direct-mail companies under state DTPAs.

For example, the Federal Trade Commission Act (FTCA)<sup>209</sup> forbids “unfair or deceptive acts or practices in commerce,”<sup>210</sup> but it does not satisfy the accepted tests for preemption:

It is well established that within constitutional limits Congress may preempt state authority by so stating in express terms. Absent explicit preemptive language, Congress’ intent to supersede state law altogether may be found from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” “because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,” or because “the object sought to be obtained by the federal law and the character of obligations imposed on it may reveal the same purpose.”<sup>211</sup>

Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it conflicts with federal law. Such a conflict arises when “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>212</sup> In this case, Congress has not limited state authority explicitly, and no scheme of federal regulation is pervasive enough to make reasonable the inference that Congress left no room for the states to supplement it.<sup>213</sup>

The third theory of preemption—where an act of Congress (here, the FTCA) touches a field in which the federal interest is “so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject”<sup>214</sup>—may apply to enforcing many states’ similar DTPAs.

This would, however, only be evidence of Congress’s *intent* to preempt state action. Imputing such an intent to Congress in this case is counterintuitive. That the states were intended to be able to protect their citizens from deceptive trade practices is hard to deny.

The fourth and fifth types of preemption, similarly, are based on the assumption that Congress intended to preempt state action. Congress has not revealed its intent to completely supplant state legislatures in passing laws against deceptive trade practices. State law would be preempted “to the extent that it actually conflicts with federal law.”

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208. George T. Conway, III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1116 (1987).

209. 15 U.S.C. §§ 41-77 (1988 & Supp. V 1993).

210. 15 U.S.C. § 45 (1988). Only the FTC may sue under the FTCA. *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

211. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (quoting *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982)).

212. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidow*, 312 U.S. 52, 67 (1941)).

213. In fact, the FTC has encouraged the states to pass their own DTPAs. *See Lee, supra* note 193, at 143 n.10.

214. *Fidelity Fed. Sav. & Loan*, 458 U.S. at 153.

State law conflicts with federal law if obedience to both state and federal laws is impossible,<sup>215</sup> or if state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>216</sup>

In order to use this last line of analysis, one must accept that Congress has the same purposes and objectives as the drafters of the Constitution.<sup>217</sup> Because of the lack of congressional intent to preempt and the lack of actual conflict between state and federal law, the traditional preemption doctrine does not resolve this issue.<sup>218</sup>

### B. *Dormant Commerce Clause*

Where Congress has not acted, “negative” or “dormant” Commerce Clause theory governs.<sup>219</sup> Although the Dormant Commerce Clause is “hopelessly confused,”<sup>220</sup> it provides that states may not act to impede interstate commerce even where Congress has not spoken.<sup>221</sup>

Dormant Commerce Clause theory is based on the proposition that the framers of the Constitution gave commerce power to Congress in “the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>222</sup>

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215. This sort of conflict is not involved here, since the state acts are similar to the FTCA (and, indeed, many of the state acts are modeled after the FTCA). *See Lee, supra* note 193.

216. *See Lee, supra* note 193.

217. One of the chief purposes of the Constitution was to remove obstacles to interstate commerce. As Alexander Hamilton stated:

An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and rigor from a free circulation of the commodities of every part.

THE FEDERALIST NO. 11 (Alexander Hamilton).

218. *See Wolfson, supra* note 197, at 111-14 (“The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it preempts state legislation outside those areas that the Constitution reserves for Congress alone.”).

219. For a history of Dormant Commerce Clause jurisprudence, *see Lisa J. Petricone, Comment, The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443 (1987).

220. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981).

221. There are several different tests of whether a state statute is valid under the Dormant Commerce Clause. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979) (three-prong test); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (different test where purpose of state statute is to promote the public health or safety). *But see Wolfson, supra* note 197, at 72 (“[C]ourts could act to ensure that plaintiffs relying on preemption doctrine are not trying to revive [D]ormant [C]ommerce [C]lause restrictions on state power.”). There was a constitutional theory that the Commerce Clause forbade state courts from asserting jurisdiction over out-of-state defendants when to do so would unreasonably burden interstate commerce. *See Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312 (1923). This theory was short-lived. The current solutions may require reconstitution of this ephemeral theory.

222. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1349 (1994)

The notion of a Dormant Commerce Clause has existed in some form in the Court's decisions for more than a century and a half.<sup>223</sup> The test for violations of the Dormant Commerce Clause has evolved throughout this time "as the volume and complexity of commerce and regulation have grown in this country."<sup>224</sup> James Madison's initial view, embraced by Chief Justice Marshall in *Gibbons v. Ogden*,<sup>225</sup> posited that Congress's power to regulate commerce under the Commerce Clause was plenary, and that state legislation was permitted to impact upon commerce somewhat only if it did not regulate or tax commerce.<sup>226</sup> The Madisonian approach was countered by those on the Court, like Marshall's successor, Chief Justice Taney, who asserted that the Commerce Clause only forbade state legislation that conflicted with federal law.<sup>227</sup> Under this view, no Dormant Commerce Clause existed in relation to Congress's power to preempt state action.<sup>228</sup>

The test that developed from the synthesis of these antithetical principles was one of "subject." State legislation would be upheld if its subject were "local" rather than "national."<sup>229</sup> Uniform regulation was necessary for the national economy, so state regulations affecting the national economy were held unconstitutional. State regulation of local commerce was held valid.<sup>230</sup> Whether a particular subject matter was local or national depended on whether that field required diverse treatment or a uniform plan.<sup>231</sup> In one expression of this test, the Court held that a regulated field was national because commerce would be disrupted by all states making their own rules.<sup>232</sup>

The "local/national" dichotomy was used by the Court until the 1880s,<sup>233</sup> when it shifted to the "direct/indirect" test.<sup>234</sup> Regulation was valid under this test if it affected interstate commerce "indirectly, incidentally, and remotely,"<sup>235</sup> but not if it was a "direct

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(quoting *Hughes*, 441 U.S. at 325-26). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, . . . has as its corollary that the states are not separable economic units." *Id.* (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949)).

223. *Id.*

224. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

225. 22 U.S. (9 Wheat.) 1 (1824).

226. *Id.* at 209.

227. See *The License Cases*, 46 U.S. (5 How.) 504, 573-86 (1847) (Taney, C.J., concurring). Taney acknowledged that "[i]t is well known that upon this subject a difference of opinion has existed, and still exists, among the members of this Court." *Id.* at 578.

228. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 322 (1978).

229. *Cooley v. Board of Warrons*, 53 U.S. 299, 318-19. See generally TRIBE, *supra* note 228, at 405 (1988).

230. *Cooley*, 53 U.S. at 318-19.

231. *Id.*

232. *Wabash, St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 557 (1886).

233. See, e.g., *Wabash*, 118 U.S. 557; *Ex Parte McNeil*, 80 U.S. (13 Wall.) 236 (1871); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865).

234. *Smith v. Alabama*, 124 U.S. 465 (1888).

235. *Id.* at 482.

burden" on interstate commerce.<sup>236</sup> In the 1940s, the test changed again<sup>237</sup>—to the test that has survived to the present.

The current test for whether a law violates the Dormant Commerce Clause has two parts. First, a court will "determine whether it 'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce.'"<sup>238</sup> Discrimination in this context is treatment that benefits in-state economic interests and burdens out-of-state interests.<sup>239</sup> If a restriction on commerce is discriminatory, it is "virtually per se" invalid.<sup>240</sup>

If, on the other hand, a restriction is not discriminatory but has incidental effects on interstate commerce, it is valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."<sup>241</sup> Under this test—known as the *Pike* balancing test—whether a burden on interstate commerce will be tolerated depends on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."<sup>242</sup>

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236. See, e.g., *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

237. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

238. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 114 S. Ct. 1345, 1351 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

239. *Id.* One writer has suggested that the Dormant Commerce Clause requires a discriminatory *purpose*. See Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986), but the Court itself has not required such a purpose.

240. *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1351. See also *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1913 n.6 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

241. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See *Oregon Waste Systems, Inc.*, 114 S. Ct. at 1351.

For an argument that the Court, in applying this test, is not actually balancing factors, *see generally* Regan, *supra* note 239. See also *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) ("If Regan is not correct, he ought to be."). As long as a statute is not discriminatory, it should be upheld. *Id.*

Justice Scalia has, in several concurrences, argued for the Dormant Commerce Clause. See, e.g., *Goldberg v. Sweet*, 488 U.S. 252, 271 (1989) (Scalia, J., concurring); *Tyler Pipe Indus. v. Department of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part).

Despite Regan's argument that the Justices are "imperfectly aware of what they are doing" in the Dormant Commerce Clause context, Regan, *supra* note 239, at 1284, this Article takes the Court at its word and analyzes the burden of multistate regulation on interstate commerce using the *Pike* test.

242. *Pike*, 397 U.S. 137 at 142. Challenges to safety regulations face a "strong presumption of validity." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (market regulation justified by environmental concerns); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978) (truck length statute invalidated despite presumed validity); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island, & Pac. R.*, 393 U.S. 129 (1968) (train crew statute upheld); *Huron Portland Cement v. City of Detroit*, 362 U.S. 440 (1960) (smoke abatement regulation upheld despite burden on interstate commerce); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938) (truck length statute upheld); *Bradley v. Public Utility Comm'n*, 289 U.S. 92 (1933) (state's refusal to license interstate carrier to travel over congested route upheld).

The jurisdiction of the federal courts gives them the procedural power to protect the free market by preventing state actions from harming interstate commerce.<sup>243</sup> For example, the court has wielded this power to strike down state laws imposing sales taxes<sup>244</sup> and discriminatory use taxes<sup>245</sup> on out-of-state companies. The constitutional principle that the interstate market in goods should be free stands behind all of these Dormant Commerce Clause cases.

Two possible Commerce Clause challenges could be made to the state AGs' behavior. The first is that the DTPAs under which they sue violate the Dormant Commerce Clause because they interfere with interstate commerce. The second is that the DTPAs as applied by secondary states to extract money from interstate companies violate the Dormant Commerce Clause.

*1. State's Deceptive Trade Practices Act—Per Se—as Violation of Dormant Commerce Clause.*—On their faces, state DTPAs regulate even-handedly. Their broad language forbids anyone from engaging in deceptive trade practices. Because the acts do not discriminate against interstate commerce on their face, they pass the first prong of the *Pike* balancing test. Having determined that, facially, the statute will have only incidental effects on interstate commerce, the next question is whether the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.<sup>246</sup> Answering this question requires consideration of “the nature of the local interest involved, and [of] whether it could be promoted as well with a lesser impact on interstate activities.”<sup>247</sup>

The local interest involved is the protection of citizens from deceptive trade practices. Facialy, these statutes create a burden on interstate commerce. Because vague laws exist, a company cannot know whether its behavior will expose it to liability in one state, or in all fifty.<sup>248</sup> The cost of doing interstate business increases because VMCs must anticipate and prepare for suits in every state.

The states' interest in passing DTPAs is undeniably great. That interest could be promoted as well with a lesser impact on interstate activities, as through the federal deceptive trade practices provisions of the FTCA.<sup>249</sup>

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243. *Commissioner v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

244. *See Goldberg v. Sweet*, 488 U.S. 252, 260 n.12 (1989); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Cf. International Harvester Co. v. Department of Treasury of Ind.*, 322 U.S. 340 (1944).

245. *See Dennis v. Higgins*, 498 U.S. 439 (1991) (constitutional right to free trade, under the Commerce Clause, recognized); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (“It is now established beyond dispute that ‘the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.’” (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946))).

246. *Pike*, 397 U.S. at 142.

247. *Id.*

248. *See supra* subpart I.B.

249. 15 U.S.C. § 45(a)(1) (1988) (all “deceptive acts or practices” declared unlawful). The FTC may sue in state or federal court for redress to consumers or other persons. Such redress, including damages, rescission, contract reformation, or restitution, may run against a person who has violated a trade regulation rule or engaged in dishonest or fraudulent conduct. *Id.* § 57b(a), (b).

Since the earliest Dormant Commerce Clause cases, the Court has recognized that “[w]hatever subjects of [the commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”<sup>250</sup> In *Cooley v. Board of Wardens*,<sup>251</sup> the Court addressed a challenge to a Pennsylvania statute requiring vessels arriving at or departing from Philadelphia to employ a pilot or pay half the cost of pilotage to the Society for the Relief of Distressed and Decayed Pilots, their Widows and Children.<sup>252</sup> The Court upheld the statute because, while regulation of pilotage was regulation of interstate commerce, it was “likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits.”<sup>253</sup>

As evidence of the desirability of local regulation of pilotage, the Court cited an act passed by the first Congress affirmatively maintaining the state regulations then in existence.<sup>254</sup> Furthermore, the nature of the subject left “no doubt of the superior fitness and propriety . . . of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.”<sup>255</sup>

The Court has found several fields to require national uniform regulation. In *Bibb v. Navajo Freight Lines*,<sup>256</sup> Illinois required trucks and trailers to use a certain type of rear splash guards.<sup>257</sup> The law made illegal the straight mudflaps that were legal in at least forty-five other states<sup>258</sup> and required in Arkansas.<sup>259</sup>

The court had upheld highway safety laws in the past although they materially interfered with interstate commerce.<sup>260</sup> Highway safety measures will not be invalidated under the Dormant Commerce Clause unless “the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.”<sup>261</sup>

In *Bibb*, commerce was impeded by the requirement that operators of trucks or trailers operating in Illinois spend \$30 per truck to bring them into compliance with the Illinois law.<sup>262</sup> The mud flaps required by Illinois, further, presented no safety advantage

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250. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

251. *Id.*

252. *Id.* at 299, 301.

253. *Id.* at 319.

254. *Id.* at 317 (*citing* Act of Aug. 7, 1789, § 4 (repealed 1837)).

255. *Id.* at 320.

256. 359 U.S. 520 (1959).

257. *Id.* at 521-23.

258. *Id.* at 523.

259. *Id.*

260. See *South Carolina Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177 (1938) (truck width and weight regulation sustained); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Sproles v. Binford*, 286 U.S. 374 (1932) (truck weight regulation upheld).

261. *Bibb*, 359 U.S. at 524 (*quoting* *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775-76 (1945)).

262. *Id.* at 525.

over the straight mud flaps required in other states.<sup>263</sup> The Court held, however, that if these were the only two factors involved—if the only question were whether the cost of adjusting to the Illinois statute unduly burdened interstate commerce—the statute would be upheld.<sup>264</sup> The statute was invalidated because the Illinois law conflicted with other states' laws such that an interstate carrier would have to shift its cargo to different vehicles depending on the state it was entering.<sup>265</sup> Interstate travel, the Court concluded, required national uniformity.<sup>266</sup>

In *Morgan v. Virginia*,<sup>267</sup> the Court used similar logic to void Virginia's bus segregation statute. It found that racial seating arrangements in interstate travel required a single uniform law<sup>268</sup> and that, as a result, the Virginia statute requiring interstate buses to segregate black passengers and white passengers "to avoid friction between the races"<sup>269</sup> was invalid.<sup>270</sup>

Like interstate travel, interstate trade through the media of the mail, common carriers, and electronic communication requires national uniformity. While it would be possible for a VMC to conform with all fifty states' deceptive trade practice laws,<sup>271</sup> the burden of determining what these laws are and how they can be followed creates a huge burden on interstate commerce, especially since the companies involved do not have staffs or legal representation in any but a few of the states.<sup>272</sup>

In *Southern Pacific Co. v. Arizona*,<sup>273</sup> the Court addressed the constitutionality of an Arizona statute requiring trains operating in that state to be less than a certain length.<sup>274</sup> The Court noted, as a basic proposition, that

ever since *Gibbons v. Ogden*, [22 U.S. (9 Wheat.) 1 (1824)], the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.<sup>275</sup>

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263. *Id.* (quoting *Navajo Freight Lines v. Bibb*, 159 F. Supp. 385, 388 (S.D. Ill. 1958)).

264. *Id.* at 526 ("We would have to sustain the law under the authority of the *Sproles, Barnwell, and Maurer* cases.").

265. *See id.*

266. *Id.* at 527 (citing *Morgan v. Virginia*, 328 U.S. 373, 386 (1946)).

267. 328 U.S. 373 (1946).

268. *Id.* at 386.

269. *Id.* at 374, 380.

270. *Id.* at 386.

271. *I.e.*, by conforming to the law of the strictest state.

272. *See supra* notes 12-13 and accompanying text.

273. 325 U.S. 761 (1945).

274. *Id.* at 763.

275. *Id.* at 767-68 (citing *Edwards v. California*, 314 U.S. 160, 176 (1941); *Minnesota Rate Cases*, 230 U.S. 352, 399-400 (1913); *Leisy v. Hardin*, 135 U.S. 100, 108-109 (1890); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)). The Court noted that "to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Id.* at 767-68 n.2.

The Court balanced the state and national interests involved.<sup>276</sup> Operation of long trains—those that would not pass the Arizona statute—was “standard practice over the main lines of the railroads of the United States.”<sup>277</sup> Because of this discrepancy, the subject of train lengths demanded national uniformity.<sup>278</sup> Arizona’s train length statute burdened interstate commerce by increasing the cost of operating trains in Arizona “to about \$1,000,000 a year”<sup>279</sup> and by impeding efficient operation of interstate trains.<sup>280</sup>

Arizona’s enforcement of its train length law, while other states regulated by different standards, “must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application.”<sup>281</sup> The Court did not suggest that the Arizona statute conflicted with other states’ statutes—Arizona and Oklahoma were the only states with train length limits, and both limited freight trains to seventy cars.<sup>282</sup> In this case, the burden was not that companies would be unable to operate the same train in all states, but rather “confusion and difficulty . . . under the varied system of state regulation and the unsatisfied need for uniformity.”<sup>283</sup>

Because of the nature of the activity regulated, the statute invalidated in *Southern Pacific Co.* required interstate companies to break up trains passing through Arizona.<sup>284</sup> The Arizona Supreme Court had upheld the train-length statute because, while it burdened interstate commerce, it was within the state’s police power.<sup>285</sup> The Court responded that invocation of the police power was not enough to justify a burden on interstate commerce if the regulation passes “beyond what is plainly essential to safety.”<sup>286</sup> The statute thus “control[led] the length of passenger trains all the way from Los Angeles to El Paso.”<sup>287</sup> The impediment to the free flow of commerce, said the Court, was “apparent.”<sup>288</sup>

In *Kassel v. Consolidated Freightways Corp.*,<sup>289</sup> the Court again addressed the problem of a statute that regulated interstate transportation under a claim of safety

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276. *Id.* at 768-69.

277. *Id.* at 771.

278. *Id.*

279. *Id.* at 772. The Court does not say what the cost of operating trains in Arizona would be absent the statute. It does say, however, that the law requires the appellant to haul “over 30% more trains in Arizona than would otherwise have been necessary.” *Id.* at 771-72.

280. *Id.*

281. *Id.* at 773.

282. *Id.* at 774.

283. *Id.* at 774.

284. *Id.*

285. *Id.* at 764.

286. *Id.* at 781 (citing *Kelly v. Washington*, 302 U.S. 1, 15 (1937)).

287. *Id.* at 774-75.

288. *Id.* at 775.

289. 450 U.S. 662 (1981).

regulation and police power. Iowa had a statute forbidding shippers from using sixty-five-foot double-trailer rigs in the state.<sup>290</sup> It claimed that the law was "a reasonable safety measure enacted pursuant to its police power."<sup>291</sup>

The District Court struck down the law, holding that "[t]he total effect of the law as a safety measure . . . is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it."<sup>292</sup> The Court of Appeals for the Eighth Circuit affirmed,<sup>293</sup> as did the Supreme Court, holding that the burden on interstate commerce—the requirement that companies using sixty-five-foot double trailers route them around Iowa or ship the trailers through separately—added "about \$12.6 million each year to the costs of trucking companies,"<sup>294</sup> and thus outweighed the safety interest putatively promoted by the statute.<sup>295</sup>

The DTPAs, like train and truck length statutes, control companies' behavior in states other than their own. A VMC, like the railroads in *Southern Pacific Co.*, is "subjected to regulation which is not uniform in its application."<sup>296</sup> While all of the DTPAs forbid "deceptive" trade practices, the standard for unfairness will vary with judicial interpretation from state to state. Interstate commerce is impeded because VMCs must anticipate what all of the states will say about a given practice and must conform their practices in dealing with citizens of each state to that state's law of deception.

VMCs' low overhead is partially attributable to the fact that they deal the same way with all fifty states, and do not need either to hire legal counsel in all the states nor to change their mass communications to conform to the individual states' nonuniform laws.<sup>297</sup> The serious impediments to the free flow of commerce by the local regulation of deceptive trade practices and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.<sup>298</sup>

In the case of deceptive trade practices by VMCs, no act of Congress grants the states individual control. Because these corporations send the same materials into all the states, the subject matter is national in scope and demands uniform national regulation;<sup>299</sup>

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290. *Id.* at 665, 667.

291. *Id.* at 667.

292. *Id.* at 668. Unlike in *Bibb*, other states did not have laws conflicting with the challenged law that would make it impossible to operate the same equipment in all states. The statute was struck down anyway. *Cf. Huron Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) (Because "[t]he record contains nothing to suggest the existence of any such competing or conflicting local regulations[,] . . . no impermissible burden on commerce has been shown.").

293. *Kassel*, 450 U.S. at 668.

294. *Id.* at 674. The court also considered the fact that there were exemptions to the statute that were helpful to local interests or "offered the benefits of longer trucks to individuals and businesses in important border cities without burdening Iowa's highways with interstate through traffic." *Id.* at 676.

295. *Id.* at 678-79.

296. *Southern Pacific Co.*, 325 U.S. at 773.

297. See *supra* notes 12-13 and accompanying text.

298. *Southern Pacific Co.*, 325 U.S. at 775 ("The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.").

299. The commerce in which the VMCs are engaged is similar to that of interstate transportation

disparate state regulations—even if they are disparate only because they are subject to different interpretations by the different state courts—constitute a minefield for VMCs and a burden on interstate trade.

Balanced against the burden caused by the disparate deceptive trade practices regulations is any putative benefit of having different regulations from state to state. No such benefit exists if the definition of deceptive varies from state to state—that is, if residents of one state are more intelligent or alert than those of another. That notion is clearly wrong because while people certainly differ in how easily deceived they are, no reason exists to believe that these differences depend on the state in which they live. Rather, it depends on their sophistication in the subject area. For example, a Little Rock lawyer may be more difficult to deceive in business matters than an Ozark mountain man, but should not, by mere dint of his state of residence, be more susceptible to skulduggery than a Wall Street lawyer. The notion that deceptive trade practices regulations should vary from state to state is silly.

The interests of both in-state consumers and interstate trade will be best served by a rule that allows consumers to take advantage of the low-cost services of VMCs<sup>300</sup> without allowing unethical corporations to take advantage of the consumers. A prototypical rule would allow the states to continue using their DTPAs against in-state companies<sup>301</sup> and force them to act against foreign VMCs either through the federal statutes or through their own statutes in federal court.<sup>302</sup> Such a rule would increase the efficiency of our courts,<sup>303</sup> decrease the cost of doing multistate business, and protect the interests of each state's consumers.<sup>304</sup>

A related proposition that was not directly explored in this line of cases, but that has gained some authority since then, is that a state may not regulate a company's activities in another state. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,<sup>305</sup> the Court addressed the problem of New York's Alcoholic Beverage Control (ABC) Law.<sup>306</sup> The law required every liquor distiller or producer selling liquor to wholesalers within New York to sell at a price "no higher than the lowest price at which such item of liquor will be sold . . . in any other state of the United States." Brown-Forman, the

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companies. Rather than roads, the VMCs send their wares through the mail and over voice and data lines. Regulations of this commerce might be described as "information superhighway" (as opposed to actual highway) safety regulations.

300. It must be noted that "consumer protection" statutes do not provide an unattenuated benefit to consumers. Any addition to the cost of doing business will be passed on to those consumers by the companies affected.

301. The societal cost of subjecting a local company to a state's DTPA is minimal. Such a company will already have legal representation in the state, and will be able to become familiar with the law and defend against charges of violations at very small marginal cost. As a result, a virtual corporation would be subject to suit under the law of its home state and federal law; multistate corporations would be subject to suit wherever they did business.

302. See *infra* notes 317-29.

303. A company could be sued in one action for allegedly deceptive acts in all 50 states.

304. Consumers might be better protected by this rule than by the present chaotic state of the law.

305. 476 U.S. 573 (1986).

306. *Id.* at 575.

appellant distilling company, wished to offer its wholesalers kickbacks as a “promotional allowance.”<sup>307</sup> The New York Liquor Authority barred the company from paying these kickbacks to New York wholesalers and determined that these payments lowered the effective retail price in other states, putting the appellant in violation of the ABC Law.<sup>308</sup> Brown-Forman argued that because other states had price affirmation statutes that did not treat the promotional allowances as discounts, the New York ABC Law would have the effect of requiring Brown-Forman to abandon the promotional allowances in all states.<sup>309</sup> The New York courts rejected this argument, holding the effects argument as “speculative.”<sup>310</sup>

The New York affirmation law, it was agreed, “regulate[d] all distillers of intoxicating liquors evenhandedly”;<sup>311</sup> the state’s interest—low liquor prices for residents—was legitimate.<sup>312</sup> Because the ABC Law *effectively* regulated the price of liquor in other states, however, it violated the Dormant Commerce Clause.<sup>313</sup> The fact that the law was addressed only to sales in New York was irrelevant;<sup>314</sup> “[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.”<sup>315</sup>

Like New York’s liquor price affirmation statute, a state’s DTPA, insofar as it applies to the interstate communications of a VMC, effectively forces that corporation to conform its entire business to the law of that state or forego business with its residents.

Because an available method of achieving the goals of the states’ DTPAs without adverse impact on interstate commerce exists, those acts—on their faces, in their applicability to VMCs—violate the Dormant Commerce Clause under the *Pike* balancing test,<sup>316</sup> and are thus void.

2. *States Deceptive Trade Practices Acts Applied.*—The DTPAs themselves, applied to VMCs, violate the Dormant Commerce Clause because they create an undue burden

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307. *Id.* at 576.

308. *Id.* at 577.

309. *Id.* at 578. The result of the New York law was that Brown-Forman would have to either stop giving the kickbacks in other states or lower the price of liquor in New York. If it did the latter, it would be violating the price affirmation statutes of other states, so it was forced to do the former. *Id.* at 577-78.

310. *Id.* at 578.

311. *Id.* at 579.

312. *Id.*

313. *Id.*

314. *Id.* at 583.

315. *Id.* at 582. The argument that the company could have avoided the discriminatory effect of the statute by ceasing its operations in New York was not presented, and should not have been. If states are allowed to force companies into what amount to contracts of adhesion in violation of the Dormant Commerce Clause, the result will be the economic balkanization that the drafters of the Constitution feared. For the same reason, VMCs should not be forced to choose between, on the one hand, discerning and following the law of deceptive trade practices in a state and, on the other hand, ceasing operations in that state. This explanation is simply another way of describing the need for uniform national regulation governing the practices of VMCs.

316. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

on interstate commerce. As noted *supra*, because of the vagueness of current statutes, a company cannot know whether its behavior will expose it to liability in all fifty states.<sup>317</sup>

The statutes are not facially discriminatory because they may be applied equally to in-state and out-of-state companies. However, they have an incidental detrimental effect on interstate commerce.<sup>318</sup> Because of this detrimental effect, the second half of the *Pike* test<sup>319</sup> comes into play. Under this test, the court must determine whether the burden on commerce is clearly excessive in relation to the local benefits of the statute.<sup>320</sup> “[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”<sup>321</sup>

The local interest involved in the DTPAs of protecting consumers from exploitation by unscrupulous business is undeniably great. That interest could be successfully promoted with a lesser impact on interstate activities, through the federal deceptive trade practices provisions of the FTCA<sup>322</sup> and mail fraud statutes.<sup>323</sup>

Even if the deceptive trade practices acts were not invalid because of their application to VMCs—if, for example, they created identical standards of conduct in the fifty states—their application as revenue enhancers by predatory AGs violates the Dormant Commerce Clause. The key to many of the Supreme Court’s Dormant Commerce Clause cases is the effect of the challenged statute *as applied*.<sup>324</sup> A state’s regulation may have a discriminatory effect where it gives local goods a larger share of the total market in that state.<sup>325</sup> States may not interfere “with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”<sup>326</sup>

The use of DTPAs by predatory state AGs as tools for revenue enhancement through settlement offers is constitutionally objectionable. The strategy is intended to squeeze as much money as possible from VMCs—in other words, to burden them as much as possible—without affecting the in-state companies that are in a position to affect, through state legislatures, the budget and the power of the state AG. If the DTPAs, as applied, were not a burden on interstate commerce, they would not make money; if they were as much of a burden on in-state commerce, they would be halted by in-state businesses.

The argument for a violation of the Dormant Commerce Clause by state AGs depends, again, on the Court’s two-part test. A discriminatory effect is immediately

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317. See *supra* note 248 and accompanying text.

318. This detrimental effect is that the cost of interstate commerce increases because VMCs must anticipate suit in all the states.

319. See *supra* notes 241-47 and accompanying text.

320. *Pike*, 397 U.S. at 142.

321. *Id.* at 143.

322. 15 U.S.C. § 45(a)(1) (1988) (all “deceptive acts or practices” declared unlawful). The FTC may sue in state or federal court for redress for consumers or other persons. Such redress, including damages, rescission, contract reformation, or restitution, may run against a person who has violated a trade regulation rule or engaged in dishonest or fraudulent conduct. *Id.* § 57b(a), (b).

323. 18 U.S.C. §§ 981(a)(1)(A), 1341, 1956(a)(1)(A)(i) (1988).

324. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 n.16 (1978).

325. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

326. *Oregon Waste Systems v. Environmental Dept.*, 1994 U.S. LEXIS 2659, at 14-15.

apparent in the use of the statutes to gain revenue discriminatorily from out-of-state companies. Because of the direct discriminatory effect, the AG's use of the statute as a revenue-enhancer through settlement offers virtually *per se* violates the Dormant Commerce Clause.<sup>327</sup> This virtual *per se* test requires the state to "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>328</sup>

The purposes served by the AGs' application of their DTPAs—protection of citizens from deceptive practices and revenue enhancement—could both be served by the nondiscriminatory alternative of treating in-state companies the same as VMCs. This goal can be accomplished by (focusing on the protective justification of the policy) reserving DTP enforcement efforts for those companies that an AG's investigation reveals to be a probable offender (rather than those companies that happen to be the targets of other AGs' suits), as well as by waiting for the conclusion of the primary suit, with preclusive effect under the Full Faith and Credit Clause, bringing a secondary suit.

Because the legitimate local purposes for applying a state's DTPA to VMCs can be adequately served by these reasonable nondiscriminatory alternatives, the use of state DTPAs as revenue enhancers by predatory state AGs violates the Dormant Commerce Clause.<sup>329</sup>

3. *An Alternative "Process-Oriented" Theory.*—One critic of the Court's Dormant Commerce Clause decisions, Professor Julian N. Eule, argues that, while the Commerce Clause was originally intended to prevent state actions interfering with interstate commerce, the justification for such an interpretation no longer exists.<sup>330</sup> Eule's argument takes the writings of James Madison as the strongest justification for a plenary commerce power in the federal government.<sup>331</sup> Madison's view was that Congress would be impotent in the commercial field,<sup>332</sup> so that, considering the state's absence of commerce power, no commercial legislation would exist at all.<sup>333</sup>

Under this "impasse theory,"<sup>334</sup> the courts were the logical actors to prevent the courts from interfering with "the national interest in free trade."<sup>335</sup> Now, however, Congress has

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327. U.S. CONST. art. IV, § 1, cl.1.

328. The most important of these fact questions is, of course, whether the company's actions are deceptive.

329. As the suit is only *threatened*, the VMC's appropriate cause of action is an injunction against the secondary AGs or a § 1983 action for violation of the Dormant Commerce Clause.

330. Julian N. Eule, *Laying the Dormant Clause to Rest*, 91 YALE L.J. 425, 431-32 (1982).

331. See e.g., Eule, *supra* note 330, at 430-31 ("Judging from the constitutional language alone, one might tend to conclude that the Framers left protection of the national market to congressional supervision rather than judicial enforcement. This, however, does not appear to have been the vision of the original framer.").

332. See Eule, *supra* note 330, at 431. "Madison expected the competing economic interests represented in Congress to neutralize each other and prevent the enactment of regulation of interstate trade." Eule, *supra* note 330, at 431 (*citing* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-3 at 321-22 (1978)).

333. Eule, *supra* note 330, at 431.

334. Eule, *supra* note 330, at 431.

335. Eule, *supra* note 330, at 431. (If Congress were "paralyzed in the face of potent and conflicting local interests," it could not act to void unconstitutional state actions.).

proven, through a plethora of acts and regulations,<sup>336</sup> that to regulate interstate commerce is anything but impotent.<sup>337</sup>

Because Congress has shown its ability to regulate interstate commerce, Eule argues, [i]t no longer makes sense for the Court to invalidate evenhanded state legislation merely because it burdens interstate commerce too heavily. Under the court's present standard, the likelihood of judicial invalidation increases with the degree of burden imposed by state law, and the weight of the national interest. But this is precisely the situation in which action by Congress of administrative agencies is most likely.<sup>338</sup>

Eule goes on to propose a "process-oriented approach"<sup>339</sup> to the Dormant Commerce Clause. While the Court's current "value-oriented" or "free trade"<sup>340</sup> approach weighs the burden imposed on interstate commerce against the national interest threatened, Eule's proposed standard would focus on the "proportional division of the burden" between in-state and out-of-state interests.<sup>341</sup> The states' regulatory attacks on direct-mail companies violate the Dormant Commerce Clause under the process-oriented standard. Eule's proposed test under this standard has four parts.<sup>342</sup>

The first step is to determine whether there is a legitimate purpose for the state's actions.<sup>343</sup> If the state has no legitimate goal, the statute is invalid *per se*.<sup>344</sup> At this point, discriminatory purpose (but not effect) invalidates the state action.<sup>345</sup> In the case of state regulation of deceptive trade practices, we may presume that the state can articulate a legitimate goal in protecting its citizens from deceptive trade practices.<sup>346</sup>

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336. See Eule, *supra* note 330, at 431 (This plethora of acts and regulations includes legislation "in such diverse areas as crime, civil rights, job safety drug manufacturing, and endangered animals.").

337. See Eule, *supra* note 330, at 432. ("The Madisonian impasse model of a Congress deadlocked by competing geographic economic concerns is no longer reflected in reality.").

338. Eule, *supra* note 330, at 436.

339. See Eule, *supra* note 330, at 439-46.

340. See Eule, *supra* note 330, at 439.

341. Eule, *supra* note 330, at 439.

342. See Eule, *supra* note 330, at 457-74.

343. Eule, *supra* note 330, at 457. Under this first step, the state has the burden of producing evidence of the goals of its actions; once the state produces a goal, it will be "taken at its word." Eule, *supra* note 330, at 457-59.

344. Eule, *supra* note 330, at 459.

345. Eule, *supra* note 330, at 459 n.187.

346. If, instead of the statute, a company is challenging the state's policy of seeking revenge from out-of-state companies by threatening deceptive trade practice suits, the state's goal may be mere revenue collection—another legitimate goal. In either case, the state action will be invalidated under one of the later steps in Eule's test.

Assuming the state action passes the first step, the company must show that the state action<sup>347</sup> has a “disproportionate impact on nonrepresented interests.”<sup>348</sup> The VMC can demonstrate a disproportionate impact four ways.<sup>349</sup>

The first way to show disproportionate impact is to show facial disparity—a statute that “distinguishe[s] between the represented and unrepresented interest[] on [its] face.”<sup>350</sup> If facial disparity exists, “[t]he impact of these provisions falls entirely on those to whom the legislators are not answerable,”<sup>351</sup> and thus, is disproportionate. The states’ DTPAs are not facially discriminatory; they forbid deceptive trade practices by in-state as well as out-of-state actors.

The second possible way to show disproportionate impact is to show that the statute “provides important exemptions obtainable only by local interests.”<sup>352</sup> These exemptions may be explicit<sup>353</sup> or hidden.<sup>354</sup> In either case, they may demonstrate disproportionate impact. In the case of states’ DTPAs, local interests are protected from becoming revenue sources under the Acts by the fact that they will not be as willing to settle as are out-of-state VMCs.<sup>355</sup> Because the AGs have discretion as to their targets, in-state companies are disproportionately exempted, *de facto*, from the AGs’s revenue-raising settlement offers.

Third, disproportionate impact may reveal itself in the nature of the regulated industry.<sup>356</sup> If the affected industry is entirely out of state, an otherwise-neutral state regulation may be entirely disproportionate,<sup>357</sup> especially if the regulation benefits in-state

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347. Eule talks in terms of valid or invalid “statutes,” but there is no reason the same analysis would not apply to state policies not codified in statutes.

348. See Eule, *supra* note 330, at 460-68. Eule speaks of “disproportionality” rather than discrimination to emphasize that an improper legislative intent is not necessary for a statute to be invalidated. See, e.g., *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), in which the Court invalidated a facially proportionate Wisconsin trailer-length regulation because its exemption provisions were not applied proportionately. *Id.* at 447. See also Eule, *supra* note 330, at 464 (Where interstate commerce was treated disproportionately, “it would exalt form over substance to recognize a distinction between the facially disparate legislation and the superficially neutral statute that conceals its discriminatory treatment of nonresidents in the trappings of restrictively afforded exemptions.”).

349. See Eule, *supra* note 330, at 461-68.

350. See Eule, *supra* note 330, at 461.

351. See Eule, *supra* note 330, at 461. The recurrent theme in Eule’s process-based Dormant Commerce Clause test may be stated as “no regulation without representation.” “The contemporary dangers of state parochialism lie in its evisceration of the democratic process, not in its impairment of free trade.” Eule, *supra* note 330, at 461.

352. See Eule, *supra* note 330, at 463-64.

353. See Eule, *supra* note 330, at 464 (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981)).

354. See Eule, *supra* note 330, at 464 (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978)).

355. See *supra* notes 202-03 (discussing the relative values of settlement offers by AGs to in-state and out-of-state companies).

356. See Eule, *supra* note 330, at 465-66.

357. See Eule, *supra* note 330, at 465. Eule quantifies disproportionality under the name “outsider impact percentage” or “OIP.” The higher the OIP, the more disproportionate the effect of the state action; an

industry.<sup>358</sup> In the present case, the statutes in question regulate all industries, so no disproportionate impact exists under this third criterion.

The fourth criterion for disproportionate impact is the nature of the regulation.<sup>359</sup> If the state action affects “only a small subgroup of the regulated whole[,] . . . composed exclusively or predominantly of unrepresented entities,” the virtual company will have proven disproportionate impact.<sup>360</sup> In the case of the DTPAs, only out-of-state companies are forced to set up defenses or settle. Furthermore, evidence suggests that actual multistate corporations<sup>361</sup> encourage states to use their DTPAs to reduce the commercial advantage enjoyed by low overhead VMCs.<sup>362</sup> These factors provide at least a *prima facie* case for disproportionate impact.<sup>363</sup>

If, under the second step of Eule’s test, no disproportionate impact exists, the state may justify its actions under a “rational basis” test.<sup>364</sup> If, on the other hand, out-of-state interests are disproportionately impacted (as in the case of settlement offers by state AGs under DTPAs), the next step is to inquire “whether the proposed legislative scheme is likely to achieve the proffered goal.”<sup>365</sup> Under this inquiry, “the state [must] demonstrate

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action with an OIP of 100% affects only out-of-state interests. *See Eule, supra* note 330, at 460. Eule cites a “hypothetical New York statute prohibiting the sale within the state of any orange juice product” as an example of a legislative effort with an OIP of 100%. The Court did not share Eule’s views. *See Eule, supra* note 330, at 465-66 (discussing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (holding a statute valid despite the fact that nearly all of the entities affected were out-of-state firms) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (same)).

358. *See Eule, supra* note 330, at 465 n.215.

359. *See Eule, supra* note 330, at 467-68.

360. *See Eule, supra* note 330, at 467.

361. “Actual,” as opposed to virtual, multistate corporations are companies doing business in many states and having personnel and assets in more than their home states. The prototypical actual multistate corporation is Wal-Mart, which does business through its stores in more than 40 states and does not sell its products by mail-order. *See supra* note 12.

362. *See supra* notes 11-14 and accompanying text (describing the low overhead and strategic advantage of virtual direct-mail corporations).

363. Further evidence of disproportionate impact by nature of the regulation would exist if there were a conflict between the laws of the states, such that the regulated parties could not operate in the challenged state and another. *See Eule, supra* note 330, at 467-68. *But see Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (upholding Illinois’s mudflap statute even though the statute made it impossible to use the same truck equipment in Arkansas and Illinois, and therefore had a disproportionate impact under Eule’s test). Eule’s analysis here resembles the Court’s test under which a state statute is preempted if it is impossible to obey both laws. *See supra* note 221 and accompanying text (discussing the court’s preemption tests).

364. *See Eule, supra* note 330, at 461. Where the legislative act falls equally or more heavily on parties whose interests are represented in the regulating body, the state need only show that its chosen means bear a natural relationship to the articulated end.

365. *See Eule, supra* note 330, at 469. This step (the “efficacy inquiry”) and the next step (the “cost-effectiveness inquiry”) would act as judicial substitutes for the legislative weighing process that has operated when legislation has a proportionate impact. When legislation has a disproportionate impact, it raises the suggestion of nonrepresentation. “Because burdens falling on nonrepresented interests post no political liabilities, the legislative inquiry of ‘Is it worth it?’ is likely to be replaced with a simpler ‘Do we want it?’” The

that it has in fact considered the efficacy of the promulgated means, that it has concluded that the end will be obtained by the means selected, and that its conclusion is empirically sound.”<sup>366</sup> The question is one of subjective knowledge—was the policy (whether legislative or executive action) likely to achieve its articulated end when instituted?<sup>367</sup> The policy may be articulated in terms of the executive policy—tracking companies who are sued in other states and settling with them for nuisance value. The end may be expressed either as “to protect the consumers of the state” or “to raise revenues.”

The policy appears unlikely to achieve the first goal. It allows the most egregious out-of-state wrongdoers to buy their peace<sup>368</sup> and punishes innocent and beneficial companies.<sup>369</sup> The policy would probably fail this step of Eule’s test if consumer protection were its only goal. The policy is, however, effective in enhancing revenue.

Having established the efficacy of the policy in achieving a legitimate articulated goal, we must move on to the fourth and final step in Eule’s process-oriented test. This test has two parts. The initial question is whether the impact of the policy falls exclusively on outsiders. If it does, the state must prove that no less disproportionate alternative for achieving its goal exists.<sup>370</sup> If the state proves this, the statute is upheld.

If, on the other hand, the burden of the policy falls, though disproportionately, on in-state as well as out-of-state interests, the state must “articulate [a] legitimate reason for [its] selection of the disproportional means.”<sup>371</sup> If it cannot, the statute fails.<sup>372</sup> If it can, the company must prove that a less disproportionate means will achieve the goal as effectively.<sup>373</sup> If the company cannot prove this, the statute is upheld. If it can, the statute is void.<sup>374</sup>

In the case of the settlement offer policy, the burden falls on in-state interests, though less than on out-of-state interests.<sup>375</sup> The state must therefore articulate a non-protectionist reason for using the settlement offer policy to raise revenues. Even if the state is able to

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legislative process is further distorted when the law will affect only outsiders because “the statute’s burden in such an instance may not merely cease to be a burden in the legislator’s mind—it may effectively become a beneficial aspect of the legislation.” Eule would have our courts ensure that the outsiders’ interests are not neglected. Eule, *supra* note 330, at 469-72.

366. See Eule, *supra* note 330, at 471.

367. See Eule, *supra* note 330, at 471.

368. Assuming, *arguendo*, that settlements with possible wrongdoers actually help to protect citizens, this policy requires a state AG to spend as little money as possible developing a case—the less an AG spends developing each case, the more cases he can settle.

369. Because of the effect this policy has on virtual corporations, it may harm consumers more than it helps them because it reduces the availability of cheap products and credit.

370. See Eule, *supra* note 330, at 458.

371. See Eule, *supra* note 330, at 458. “[L]egitimate” in this context means non-protectionist. See Eule, *supra* note 330, at 474.

372. See Eule, *supra* note 330, at 458.

373. See Eule, *supra* note 330, at 474.

374. See Eule, *supra* note 330, at 458.

375. This result occurs because of the lower nuisance value of suits to in-state defendants.

do this, the VMC will indubitably be able to suggest a less disproportionate means of raising revenue.<sup>376</sup>

### C. *Declaratory Actions*

The Declaratory Judgment Act empowers federal courts to declare the rights of a party so as to provide litigants an "experient and economical forum in which to clarify legal relations and issues and to afford relief from uncertainty."<sup>377</sup> The advantage of a declaratory action is that it provides certainty in a party's legal affairs by permitting parties who perceive themselves under a threat of liability to get a judicial determination of their rights before actual litigation.<sup>378</sup> The court has discretionary power as to whether to entertain a declaratory judgment or not. The court bases this determination on whether the declaratory action will probably result in "a just and more expeditious and economical determination of the entire controversy."<sup>379</sup>

A declaratory judgment action could be pursued in federal court against the state AGs, with certification of a class of defendants including all state AGs.<sup>380</sup> Jurisdiction would be based on a federal question<sup>381</sup>—constitutionality of suit by the AGs under the Dormant Commerce Clause. This action would serve to prevent a multiplicity of suits against the company in state court. It would also bind all of the AGs to a single decision in a single action.

On a related note, once a state AG has obtained a judgment against a VMC with all its assets in another state, it has the problem of collecting against that judgment. Because the assets are in another state,<sup>382</sup> it must go to that state to execute the judgment. To make this process easier, most states have adopted versions of the Uniform Enforcement of Foreign Judgments Act (UEFJA).<sup>383</sup> Under this statute, the AG may follow a simple procedure—for example, file the judgment with a state court and send the judgment debtor notice of execution in the other state—to make the judgment executable in a state

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376. For example, a use tax on all products purchased in the state might be upheld under Eule's test. Even if the policy is upheld in the third step as an efficacious way to protect the interests of the state's consumers, it will be invalidated in the fourth step because there is a more cost-effective (*i.e.* less disproportionate) way to do so. For a description of that less disproportionate method, *see supra* notes 347-63 and accompanying text.

377. 28 U.S.C. §§ 2201-2202 (1988 & Supp. V 1993); Gia. L. Honnen, Note, *Continental Casualty Co. v. Robsac Industries: Federal Declaratory Judgment Actions and Parallel State Proceedings—A Fifth Branch of Abstention*, 29 SAN DIEGO L. REV. 361 (1992).

378. Neil M. Goodman, Note, *Patent, Licensee Standing and the Declaratory Judgment Act*, 83 COLUM. L. REV. 186, 187 (1983).

379. CHARLES ALAN WRIGHT, *THE LAW OF THE FEDERAL COURTS* 100 (4th ed. 1983).

380. *See* David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759 (1979) (discussing the binding effect of federal declaratory judgments on state courts). *See also* Honnen, *supra* note 377, at 363 ("Circuits have split over whether parallel state proceedings require abstention and what the appropriate standard of review for the district court's exercise of discretion should be.").

381. The Federal Declaratory Judgment Act requires independent grounds for federal court jurisdiction over a declaratory judgment. 28 U.S.C. §§ 2201, 2202 (1988 & Supp. V 1993).

382. The assets are probably in the VMC's state of incorporation or its principal place of business.

383. UNIF. ENFORCEMENT OF FOREIGN JUDGMENT ACT, 13 U.L.A. 154 (1964).

other than the one issuing it. The UEFJA is intended to give foreign state judgments full faith and credit.

The VMC may sue its own AG<sup>384</sup> in its own state court under a declaratory judgment action, the purpose of which is to determine whether a given practice of the VMC is deceptive. The judgment in this court will have the benefit of the full faith and credit of other courts. If the VMC's home state court finds a practice deceptive, this finding of fact will be adopted, under the Full Faith and Credit Clause, and by other state and federal courts.

If, however, the VMC's home state court finds the practice not to be deceptive, other jurisdictions will be bound by this finding. A foreign AG wishing to sue the VMC in another state will be forced to convince that state's court that the Full Faith and Credit Clause does not demand the preclusive effect of the finding of non-deceptiveness. If he succeeds in getting a judgment, he will have to convince the VMC's state court that, despite the violation of the Full Faith and Credit Clause, the judgment is valid and enforceable under the UEFJA.

#### *D. Multidistrict Litigation*

Multidistrict litigation (MDL) presents a situation where the parties will be forced to consider the same issue separately and repeatedly in different districts.<sup>385</sup> The example presented in the Article is the VMC that is forced to fight about the same behavior in all fifty states.<sup>386</sup> There are many advantages to multidistrict litigation from the viewpoint of the plaintiff, defendant, and judicial system.

Congress has created the Judicial Panel on Multidistrict Litigation (the "Panel") "to promote efficient and expeditious processing of . . . factually related cases."<sup>387</sup> In deciding whether or not a transfer is appropriate, the Panel looks at specific standards to see whether the requirements have been met.<sup>388</sup> One of the requirements is that "[t]he transfer must promote the just and efficient conduct of the actions."<sup>389</sup> In determining whether or not this requirement has been met, the Panel looks at several factors. One factor is preventing duplication of discovery on common issues.<sup>390</sup> Under subsection 1407(b), the court supervises discovery, which results in a more "rapid and orderly progression to trial."<sup>391</sup> The advantages of the national disposition program are that duplication of discovery is avoided,<sup>392</sup> and that the defendants can no longer stretch out

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384. The VMC may also sue any other person who might sue it under the state's DTPA.

385. Francis J. Nyhan, Comment, *A Survey of Federal Multidistrict Litigation*—28 U.S.C. § 1407, 15 VILL. L. REV. 916, 917 (1970).

386. *See supra* Part IV.

387. Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711 (1991).

388. Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview* of 28 U.S.C.A. § 1407, 31 BAYLOR L. REV. 33, 41 (1979).

389. Herndon & Higginbotham, *supra* note 388, at 41.

390. Herndon & Higginbotham, *supra* note 388, at 45.

391. Nyhan, *supra* note 385, at 945.

392. Rhodes, *supra* note 387, at 719.

the proceedings in hopes that the tired and discouraged plaintiff will settle,<sup>393</sup> which is exactly what is happening to the VMCs who find it easier and more convenient to settle than to fight in all fifty states.<sup>394</sup>

The defendants also benefit from MDL in that national document depositories are set up to make document production less expensive, less time consuming, and less disruptive.<sup>395</sup> In litigation where a huge quantity of documents exists, these common depositories “may save hundreds of hours of the attorneys’ and deponents’ time.”<sup>396</sup>

Another factor the Panel uses to determine if an MDL will be just and efficient is whether or not it will “economize judicial effort by having a single judge handle matters that otherwise would have been brought to the attention of several different judges.”<sup>397</sup> By consolidating in one district, under one judge, MDLs undisputably provide for more efficient use of all the judges’ time.<sup>398</sup>

Multidistrict litigation is advantageous to all parties. In the absence of section 1407, the independent and uncoordinated litigation of claims that arise out of a common incident—a direct-mail company that sends material to all fifty states—might take years to resolve, with strain to everyone involved.<sup>399</sup>

To consolidate in federal court all state DTPA claims against foreign companies is therefore reasonable. Jurisdiction could be based upon a federal question or the Dormant Commerce Clause. Alternatively, the law could be changed to allow the Panel “to remove cases from, and to transfer cases to, *state* courts.”<sup>400</sup>

#### *E. Full Faith and Credit*

Once the challenged act has been found in one court not to be deceptive or unfair, the other sovereigns must be precluded from suing the virtual corporation for the same conduct. Otherwise, the corporation will still have to litigate or settle in each state.

The Full Faith and Credit Clause of the Constitution mandates that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>401</sup> Under this provision, the secondary sovereigns’ courts must treat the primary sovereign’s determination that the corporation’s practices are not deceptive as they would treat their own decisions, *i.e.*, they must not allow their own AGs to relitigate the already-decided factual questions.<sup>402</sup> The secondary sovereigns’ AGs should honor the Full Faith and Credit Clause and refrain from suing the virtual corporation for the practices already challenged in the primary sovereign’s court.

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393. Nyhan, *supra* note 385, at 945-46.

394. See *supra* notes 180-93 and accompanying text.

395. Nyhan, *supra* note 385, at 948.

396. Rhodes, *supra* note 387, at 720.

397. Herndon & Higginbotham, *supra* note 388, at 45.

398. Nyhan, *supra* note 385, at 949.

399. Herndon & Higginbotham, *supra* note 388, at 35.

400. Conway, *supra* note 208, at 1100 (suggesting that Congress grant the Panel discretion “to direct litigation to and from state courts”).

401. U.S. CONST. art. IV, § 1, cl.1.

402. The most important of these fact questions is, of course, whether the company’s actions are deceptive.

If a practice is found not to be deceptive in the primary state, that finding of fact will carry over to the other courts of that state; other parties in the primary state cannot challenge the practice on grounds of deceptiveness. Other state courts (and federal courts<sup>403</sup>) will therefore be bound by that finding of fact. If a secondary sovereign's AG and court insist on suing after the primary sovereign has determined that the practice is not deceptive, the defendant company may sue for an injunction for this violation of the Full Faith and Credit Clause.<sup>404</sup>

This rule has an obvious defensive application—once the primary suit has been decided in the VMC's favor, the VMC may seek summary judgment in the secondary states based on the primary state's findings of fact. Under the Full Faith and Credit Clause, the secondary states' courts are barred from adjudicating the already-decided question of whether a practice is deceptive. If they insist on attempting to relitigate the issue, the VMC may seek a writ of mandamus against the secondary state court judges, compelling them to grant summary judgment on the issue of the deceptiveness of the practice.

The Full Faith and Credit Clause also has an offensive application. When a VMC is threatened with suit in several foreign states, it can strike first by seeking a declaratory judgment in the courts of its home state on the issue of whether the challenged practice is deceptive.<sup>405</sup> If it wins this action, it will have a finding of non-deceptiveness that it can

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403. See 28 U.S.C. §1738 (1988). The statute provides:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

*Id.*

404. Note, however, that if the DTPAs were criminal, rather than civil, statutes, one sovereign's prosecution of the virtual corporation would not preclude another state from prosecuting for the same criminal act.

The Double Jeopardy Clause is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 794, 796 (1969). The Court held in *United States v. Halper*, 490 U.S. 435, 448-49 (1989), that the Double Jeopardy Clause bars government suits for retributive or deterrent civil fines against someone who has already been tried under a criminal statute for the same behavior; the Court may be expected to treat punitive fines similarly and hold that one action for a punitive fine bars another under the Double Jeopardy Clause.

However, "the doctrine of Double Jeopardy does not apply to suits brought by separate sovereigns, even if both are criminal suits for the same offense." *United States v. A Parcel of Land with a Bldg. Located Thereon*, 884 F.2d 41, 43 (1st Cir. 1989); *see also Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that the Double Jeopardy Clause does not bar one state from bringing a criminal case against an appellant on the basis of the same acts for which he was previously tried by another State).

Under the dual sovereignty doctrine, the Double Jeopardy Clause does not apply when two states prosecute a defendant for the same act because offenses against different sovereigns are different offenses. *See id.* at 88. This view would justify a finding that one state's suit for deceptive trade practices would not preclude another's if the deceptive trade practices statutes were criminal.

405. This declaratory judgment could be brought against the VMC's home state's AG or anyone else entitled to sue the VMC under its home state's DTPA.

export to all of the foreign states under the Full Faith and Credit Clause.<sup>406</sup> By initiating the primary suit itself, the VMC chooses the forum and minimizes its legal costs. The detrimental effects to interstate commerce of forcing VMCs to defend against DTP actions all over the country are minimized, as is the value of these actions to predatory AGs.

### CONCLUSION

The use of state DTPAs by predatory AGs to collect revenues from out-of-state companies is a real problem, and one that violates the Dormant Commerce Clause. It burdens interstate commerce, and it hampers the growth of VMCs, which otherwise provide immense benefits to residents of all the states.

The problem is not insoluble, however. It may be solved in a federal declaratory action against foreign state AGs, in MDL against the same parties, and in a state declaratory action on the deceptiveness of a practice. The goal of these procedures is to delay suits by secondary state AGs until the primary suit is resolved. The primary state court's finding on the deceptiveness of the practice will then be binding on the secondary states' courts under the Full Faith and Credit Clause of the United States Constitution. Miscreant companies may be punished in each of the fifty states, and righteous VMCs will be forced to defend themselves in only one foreign state's court. Consumers will be protected; the purpose of the Constitution—encouragement of a national free market—will be promoted; and the VMC, the business of the future, will thrive.

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406. *See supra* note 405. If the VMC loses this action, it will, of course, be vulnerable to actions under the DTPAs of all the states—as it should be if its practices are deceptive. If it wins this action, the finding of non-deceptiveness will be stronger for its origin in the court system with jurisdiction over the VMC's assets. Out-of-state AGs rely on the VMC's home courts giving full faith and credit to out-of-state judgments against the VMC. If an out-of-state judgment were handed down despite (that is, without according full faith and credit to) the home state's finding of non-deceptiveness, the home state may not be inclined to give full faith and credit to that judgment.

Another consideration in the area of full faith and credit is that one state is not required, under the Full Faith and Credit Clause, to enforce the penal laws of another state. *See, e.g.*, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932); *Converse v. Hamilton*, 224 U.S. 243, 260 (1912); *Huntington v. Attrill*, 146 U.S. 657, 676 (1892). While the Court has not directly addressed the question of whether a judgment *based on* a penalty is entitled to full faith and credit, *see Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 279 (1935) (“We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law . . . is within the jurisdiction of the federal district courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.”), it is possible that the VMCs' home state courts cannot be compelled to enforce a judgment under a foreign state's DTPA insofar as it is penal rather than compensatory.

# TOWARD A BIOETHICS OF COMPASSION

MICHAEL H. COHEN\*

## INTRODUCTION

Bioethics, the study of legal and ethical issues arising in health care, centers on four essential values: respect for patient autonomy, nonmaleficence, beneficence, and justice.<sup>1</sup> Although some commentators have criticized overreliance on such broad principles for ethical decision-making,<sup>2</sup> others agree that at least the four principles describe common, core values.<sup>3</sup> Autonomy refers to the patient's self-rule, and the opportunity to make meaningful choices;<sup>4</sup> nonmaleficence, to the physician's obligation to do no harm;<sup>5</sup> beneficence, to contributing to patient welfare;<sup>6</sup> and justice, to fairness and equity.<sup>7</sup> These moral principles establish ideals for relationships between physicians and their patients.<sup>8</sup> In addition, emotional responsiveness—the caregiver's feeling response to the patient—enhances the moral quality of the relationship in a way that transcends ethical principles and rules.<sup>9</sup>

A medical institute for law faculty provided an opportunity to evaluate the operation of these principles in clinical settings. I was one of nine law professors who participated in the program, and accompanied the physicians on rounds as an observer. This Article describes that experience in the context of bioethical norms and rules. Part I distinguishes two models of physician-patient relations, caregiving and curegiving. Part II describes these models through a narrative impression of the rounds, providing the basis for the evaluation of bioethical values in Part III. Part IV extends the model of caregiving by describing its application in an intersubjective framework for health care.

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1. See Tom L. Beauchamp, *The Principles Approach*, 23:6 HASTINGS CEN. REP. S9 (1993).
2. See, e.g., Ronald M. Green, *Method in Bioethics: A Troubled Assessment*, 15 J. MED. & PHIL. 179 (1990).
3. See, e.g., Susan Wolf, *Ethics Committees and Due Process: Nesting Rights in a Community of Caring*, 50 MD. L. REV. 798, 840 (1991).
4. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 121 (4th ed. 1994).
5. *Id.* at 189.
6. *Id.* at 259.
7. *Id.* at 327.
8. *Id.* at 463.
9. *Id.* at 462. "Principles and rules cannot fully encompass what occurs when parents lovingly play and nurture their children, or when physicians and nurses provide palliative care for a dying patient and comfort to the patient's distressed spouse." *Id.*

## I. CAREGIVING AND CUREGIVING

Ten days at the medical facility produced a multitude of impressions. Many physicians were caring, sensitive, and emotionally responsive to patients; others followed a more detached, objective, institutional model. The following incidents are impressions and recollections, not verbatim transcripts of conversations or actual events.

The first type of physician-patient relation might be described as *caregiving*: employing personal powers in the "art" of medicine.<sup>10</sup> Caregiving might include, for example, asking questions about the body that take into account the patient's meanings;<sup>11</sup> or, for instance, promoting the expression of feeling by patients to enhance psychological well-being.<sup>12</sup>

The second type of physician-patient relation might be described as *curegiving*, in which "the doctor knows best," the patient follows "doctor's orders," and the physician-patient relationship follows the physician's historical role as an omniscient, authoritative dispenser of healing.<sup>13</sup> Curegiving occurs when physicians reinforce patient feelings of dependence and personal estrangement, "as they exchange the status of person for that of patient."<sup>14</sup>

Physicians' tendency to adopt the curegiving model in some situations is not so much a moral failure on the part of the profession, but rather a series of unconscious individual choices which reflect a larger societal failure to honor patient feeling states and responses. Medical care is dominated by technology;<sup>15</sup> many new technologies, touted merely for their innovation, actually harm or even kill patients.<sup>16</sup> Medical care tends to hide the

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10. See ERIC J. CASSELL, 2 TALKING WITH PATIENTS 2 (1985). Cassell argues that "scientific doctors who lack developed personal powers are inadequately trained." *Id.* at 1. According to Cassell, the *art* of medicine includes not only scientific competence, but also the ability to acquire and integrate *subjective* information. *Id.* at 2. Cassell gives the example of a medical intern whose care is limited by his feeling of hopelessness, which he has unconsciously adopted from the patient. *Id.* at 3.

11. *Id.* at 16-17. Cassell notes: "History taking is often taught as if the object is to strip away all the confusion heaped on the facts by patients in order to get at the diagnosis." *Id.* at 17.

12. See, e.g., Rosanne M. Radziewicz & Susan Moeller Schneider, *Using Diversional Activity to Enhance Coping*, 15:4 CANCER NURS. 293-94 (1992).

13. See generally JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984). The view that only physicians heal is reflected in state physician licensing statutes, which typically criminalize the unlicensed practice of medicine, and arguably define practicing medicine overbroadly. See, e.g., MICH. COMP. LAWS ANN. § 333.17001(1)(b) (West 1992) (defining the practice of medicine as "diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means"); Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. STATE L.J. 79 (1995).

14. KATZ, *supra* note 13, at 209.

15. Eric J. Cassell, *The Sorcerer's Broom: Medicine's Rampant Technology*, 23:6 HASTINGS CENTER REP. 32 (1993) (Cassell quotes Emerson: "Things are in the saddle and ride mankind.").

16. David A. Grimes, *Technology Follies: The Uncritical Acceptance of Medical Innovation*, 269 JAMA 3030, 3030 (1993) (citing examples of harmful technological innovations). For instance, electronic fetal monitoring during labor was widely disseminated during the 1970s and abandoned when randomized controlled trials showed the monitoring conferred no demonstrable benefit to the fetus, yet posed significantly increased

experience of suffering, perhaps in the attempt to disguise human vulnerability, or to protect physicians from emotional overload.<sup>17</sup> Even with the hospice movement, which seeks to provide a humane, caring environment for the dying, our culture engages in a kind of "pornography of death—the thing without the appropriate human emotions."<sup>18</sup> Physicians often keep demented, elderly patients alive by feeding tubes, not because they believe it is right, but to avoid legal consequences.<sup>19</sup> The result is widespread estrangement between physicians and patients, evoking feelings of abandonment in patients, and retreat by patients into silence.<sup>20</sup> Consequently, patients bring their own self-estrangement to the doctor, along with unconscious idealizations, transferences, and disempowerment.<sup>21</sup>

The most frequently used metaphor for the physician-patient relationship is the physician as "benevolent parent"—hence, the term, "paternalism."<sup>22</sup> Whether supported by silent codes within the profession or within the culture, the paternalistic, curegiving model denies patient dignity, and contradicts core values such as autonomy, nonmaleficence, beneficence, and justice. Some of the ensuing distortions in the patient-physician relationship are illustrated below.

## II. ROUNDS

### A. *Intensive Care*

Mattie, a 94-year-old patient, lies open-mouthed, her chin hanging down in a grotesque, silent moan. Her eyes stare, without blinking, at the ceiling. Her breath is faint, almost inaudible, drowned out by the steady blip of the video monitor over her head. Her gray hair is thinned, her face withered.

"She is completely passive, totally tuned out," says Dr. S. "She's what you call a 'bad' patient," he jokes. "She went home from surgery, fell and broke her hip. Complications developed, and she ended up here."

The words echo in my mind. *She's what you call a "bad" patient.*

A nurse lifts Mattie's arm as if it were a shopping bag. She pokes it with a series of needles. Mattie does not register the piercing of her skin. She does not speak. She has

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risks of operative delivery. *Id.*

17. See Patricia L. Starck & John P. McGovern, in *THE HIDDEN DIMENSION OF ILLNESS: HUMAN SUFFERING xi* (1992).

18. Eric J. Cassell, *The Nature of Suffering: Physical, Psychological, Social, and Spiritual Aspects*, *THE HIDDEN DIMENSION OF ILLNESS: HUMAN SUFFERING 1* (1992).

19. Timothy E. Quill, *Risk Taking by Physicians in Legally Gray Areas*, 57 ALB. L. REV. 693, 697 (1994).

20. KATZ, *supra* note 13, at 208-09. Physicians thus "deprive patients of vital information, or pat patients on the back and assure them that everything will be all right." *Id.* at 210. This in turn makes patients feel "disregarded, ignored, patronized, and dismissed." *Id.*

21. *Id.* Katz provides the example of a cardiology patient's initial meeting with Dr. Chris Barnard regarding a heart transplant operation; the patient compares Barnard to a "handsome Smuts," and then to a "martyred Christ." *Id.* at 131-32 (quoting PHILIP BLAIBERG, *LOOKING AT MY HEART* 65-66 (1968)).

22. JAMES CHILDRESS, *WHO SHOULD DECIDE?: PATERNALISM IN HEALTH CARE* 6 (1982). Other metaphors include: fiduciary, partner, accomodator, contractor, technician, friend, teacher, and bureaucrat. *Id.*

not spoken in weeks, we are told. Her son, an executive, visits her once in a while. More injections.

Dr. S reminds us that Mattie is feeling no pain. "She's really out of it," he says, throwing his head back and rolling open his mouth in an O-shape to mimic Mattie's cadaverous stare. "A classic case of incompetence."

Some of the law professors are happy now. At last, they have something they can discuss: decision-making for an incompetent patient. The debate begins: Who should decide when to terminate Mattie's life support? Her son? The physician? We have shifted from a real encounter with Mattie's pain, to an esoteric discussion of legal standards. This is clearly more comfortable.

From the back of the group, I ask Dr. S: "How do you know what Mattie wants? Have you asked *her*?"

"Of course not."

"Then, have you asked her whether she would like to see a member of the clergy, to talk about the end of her life?"

He dismisses the question and takes another: "What is the son's position?" Mattie's own choice in the matter is not terribly interesting. Or perhaps it is too immediate. Nor has the attending physician bothered to ask about Mattie's emotional or religious needs. Mattie's death, like her life now, is medicalized. The discussion swirls around patient decision-making, ignoring the fact that the patient has not been consulted, and is lying in bed—awake—within earshot. It is as if we were in the midst of a very interesting hypothetical. But we are not in the lecture hall; we are in Mattie's presence. Then again, Mattie is like anaesthetized patients in surgery—tuned out, vegetative, uncommunicative (after all, she doesn't speak); and Dr. S again reminds us that Mattie feels no pain—in fact, she feels nothing at all.

I push my way to the front of the group. "How do you know she's feeling no pain?"

"It's simple." Dr. S nods in Mattie's direction. "Just look at her."

I pause, taking in the human being before me. The expression on her face reminds me of Edvard Munch's painting, *The Scream*. "Look at her face. How can you claim she experiences no pain?"

Dr. S is indignant. He cannot believe I have challenged his pronouncements. He grabs my elbow and pulls me to the patient's bedside. He is going to prove his point. The tubes connected to Mattie's arms flap like seaweed as more medicine is pumped in. I hear the video screen beep.

"Mattie," the doctor intones, leaning into her ear. "ARE YOU IN PAIN?"

"No," she groans, turning her head the other way. I am surprised; Dr. S had given the impression that she was incapable of communicating.

"ARE YOU SUFFERING?"

"No," she moans feebly.

"ARE YOU SURE?" he insists.

"Yes." She turns away, closes her eyes.

Dr. S flashes a triumphant smile. "See? See?" He shakes his head, realizing he has not yet won, and jabs his thumb toward the patient. "You ask her!"

"No . . ."

"Go ahead!" His face, flushed, leans into mine. "See for yourself."

Instinctively, my hand reaches for Mattie's. Her grasp is frail, but tender. Something flashes—a shared sense of inner life; memories of family; a mutual recognition of the

moment's physical reality; a shared awareness of Mattie's experience in this bed. I am breathing, I am feeling the ground under my feet, and I am feeling a connection with this person. The emotions rise, subside. I do not know whether emotions are safe. There are the machines. There are the injections. The doctors. The rising and falling of Mattie's breath. The snaking tubes. The video beeps.

Dr. S storms off. I am left alone with Mattie, the nurse, and the bewildering technology.

"It's okay," I say. "We care about you."

The emotions rise, refuse to subside. Her face contracts. "I want to cry," she says softly.

"It's okay, Mattie. It's okay to have feelings." I experience thick, choking grief. Mattie begins to cry, then glances at the nurse and stops.

A colleague comes up behind me and gently pulls on my arm. "It's time to go."

Our group has a coffee break. I am quiet. My colleagues complain that the communication with physicians is one-way; we pay them deference, but they have no interest in our legal thinking. Later, when pressed, one professor—a former nurse—admits she felt buoyed when she saw Dr. S challenged to confront Mattie's pain. She asks what Mattie whispered.

I tell her: "She wanted to cry."

But otherwise, Mattie is forgotten. Nobody wants to talk about it.

### *B. Pediatrics*

"And this is our pediatric ward," says Dr. T, a tall, gaunt man in his early thirties. He leads three of us into a clean, narrow, corridor where medical personnel in scrub uniforms are gazing quizzically at our nametags. He ushers us into the children's playroom, shows off the art on the wall, done by children, and describes awards. The cartoon drawings tell all: they hate the injections, they like the nurses, and they want to go home as soon possible.

A four-year-old, wearing an eyepatch, is playing ball with her mother, who sits cross-legged on the floor. I kneel down to say hello. The ball rolls towards me.

"It's a tough place, pediatrics," Dr. T says. "Extra training. Credentials."

Our next stop is an operating room at the end of the hall. The operating table is child-sized. A hand-written sign above the table reads:

REMEMBER PERSON AWARENESS.

There Is A *Person* Under

Those Jabbing Needles.

Talk To Me.

Comfort Me.

I Could Be *Your Child*.

In the next room, a child is undergoing a heart procedure. He is completely covered with a green drape, presumably to keep a sterile field. The only thing showing is the offending organ.

"You can't even tell there's a person under there."

Dr. T shrugs. "Best medical care," he says. That's jargon. It means: "leave the doctoring to the doctors." It reminds me of something a student told me, when he asked

his wife's physician which drugs were safest during her pregnancy. The doctor replied: "We know what to give her and when."

Dr. T proudly introduces the "parent room." There are sofas, books, a sturdy table, and a great view out the window. A couple is sitting at the table. The wife puts together the largest jigsaw puzzle I have ever seen. There must be over three hundred pieces.

"How is the puzzle coming?" I ask.

The woman lowers her eyes. "The doctors kicked us out."

Dr. T, ushering us out and closing the door behind him, editorializes: "That tells the whole story, doesn't it?"

### C. Surgery

"If anything happens, you'd better have an anesthesiologist around," says Dr. P. "He knows what's going on; the surgeon's just a pair of hands."

Dr. P is an old-timer. He calls all of the male surgeons, "Boy." They call him, "Sir."

Dr. P notes: "I'm the one who puts people to sleep."

We watch brain surgery. In a delicate maneuver, a man's ear has been sliced out of the way; the right side of his head has been cut away, allowing access to a particular part of the brain. The surgeons are playful as they scoop out some muck.

In the next room, rock music blares while the surgeons excise the cancer from an old man's liver. A green curtain separates the patient's face from his body; all the surgeons see is the slit-open skin, and the underlying organs. This is somebody's grandfather. Under the plastic bag that covers the patient's face, I see a grey moustache. Dr. P explains that for years they tried to find a way to keep the patient's body warm during surgery. Most of the heat escapes out the head. Finally, they made a breakthrough discovery: the plastic bag over the face.

The chief surgeon is young, handsome. "We can cut it up and take it out," he says. "No more cancer." He smiles, clearly impressed with the technology and with his skill. "Couldn't do this a few years ago." The radio announces a baseball game. Now there is a commercial for facial cream. This torrent of verbiage, electric guitars, sales pitches: is this moustached, old man really not "there"? What does it mean to say he's "asleep"? Isn't he aware, *on some level*, of everything around him—commercials, bad jokes, electric guitars, braggadocio and all?<sup>23</sup> If he dies, will the last thing he hears before leaving this world be the facial cream ad? Would the surgeon be this cavalier with his own grandfather? Or would someone be praying? Perhaps someone is praying, upstairs in the chapel, right now.

The attending nurse smiles at us and makes chit-chat. "You're law professors?"

The surgeon from the last operation enters. "Did anyone see my keys?" The others shake their heads. The operation continues.

Now Dr. P jokes: "Are you guys okay? Nobody's nauseous, are they?" He rolls his eyes. "Okay, let's get some excitement."

We rendezvous with our colleagues. One has seen a penile implant. It's the joke of the day ("how about that penile implant in O.R. 23?"). We split up again. A woman is

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23. See David Cheek, *Unconscious Perception of Meaningful Sounds During Surgical Anaesthesia as Revealed Under Hypnosis*, 1 AM. J. CLIN. HYPNOSIS 101, 109 (1959) (reporting auditory impressions by hypnotic subjects of surgeries experienced under anesthesia).

lying naked on the operating table, legs splayed like a chicken. We enter; the surgeon flashes an angry look at Dr. P.

"Do you have a problem, boy?" Dr. P says.

The surgeon pauses, then says: "No problem, sir." He looks us over and continues. We watch, huddled in the corner of the room. We can see the patient's innards on a giant computer screen over her head. We watch the surgical instruments travel through her body.

"Why don't they cover up her breasts?" one of the professors whispers to me. Another answers her: "Must be standard medical procedure."

Dr. P, ushering us out, informs us that earlier this patient stopped breathing for ten seconds. He asks us whether, after the operation, the patient should be informed of this development. He argues that the information is of "no medical value." I suggest that it might be of psychological or religious significance to the patient. He dismisses the suggestion. "If it's of no *medical* value, what's the point?"

Our next patient is a black woman, thirty years old. Cancer. She lies, anesthetized, in limbo; the surgeons around her have opened her up and found that the tumor has spread much further than anticipated. Now they wait for the pathologist's report. They are expectant, impatient; there is nothing to do but wait. It is as if we are waiting at the bus station. The patient lies before us, anesthetized, opened up.

Finally, the head surgeon breaks the silence. "So where you guys from?"

Somebody answers, awkwardly. "We're law professors—not lawyers, professors. From different parts of the country." He describes the program. There is commentary and response. We wait for the pathologist. It is awkward, this conversation. The silence that ensues is equally awkward; we are not used to being present in the face of the moment; something must fill the space. More science, perhaps. Unprompted, the surgeon decides to use the time instructively.

"See, her cancer's worse than we thought. It's spread all over the place. It started here." She lifts the patient's liver with the tongs. She lifts it up, way up, out of the body. "See? Her diet's awful. It spread to the stomach." The tongs drop the liver, seize the stomach and yank it up. Finally, the pathologist arrives and says the magic words to the surgeon. "Yeaah!" she shouts. "Just as I thought." She is happy because she won a bet with the resident as to what kind of cancer it was.

The pathologist, perhaps aware that he has an audience, reprimands her. "What're you cheering for? This means she's going to die."

Angrily, the surgeon lets a flap of skin fall back toward the patient's organs. "Then we'll sew her up. There's nothing more we can do."

The night after the surgery, at the hotel, we reflect on our experiences. Cigarette smoke fills the space between the dark-paneled walls as we sip our gin-and-tonics.

"That's so sad," someone says. "That woman, thirty-three. What will they tell the family?"

"The question is, *who's* going to tell the family? That surgeon?"<sup>24</sup>

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24. "Disclosing the death of a patient . . . is a duty which goes to the very heart of the physician-patient relationship. . . . The emotional needs of the family . . . must at all times be given foremost consideration." AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS, Op. 8.18 (1994).

"To think she was operated on for nothing."

"Did they sew her up because it was futile to operate, or because the surgeon was defensive?"

"Who knows—there's no accountability in the operating room."

"Maybe it was because she was black."

"I know one thing," I say. "The next time someone I love goes in for surgery, I'm going to insist on being in the operating room."

"You can't do that!"

"Why not? We were in there today. There's nothing magical about the O.R. that requires excluding loved ones."

"What would you do in there?"

"Just . . . be present. That way the doctors will remember there's a human being on the table, not just a body."

Suddenly the others defend the physicians: they *need* to be desensitized, otherwise they can't do what they do; they cannot personalize every patient.

I argue that every patient *is*, first and foremost, a person. This is debated at great length, the conclusion being that once the individual enters the hospital, the person is, first and foremost, a patient. Once disease enters the body, the best attitude is to be, simply . . . patient.<sup>25</sup>

### III. TOWARD A BIOETHICS OF COMPASSION

The three sets of patients described above—Mattie, the child, and the anesthetized patients—have several features in common. First, they all are dominated by invasive technology and live in a precarious position of extreme dependency and vulnerability. Mattie lives by the grace of constant injections delivered by a nurse; above her, the video screens feed back continuous information as to her physiological state. The child is unconscious, as the surgeons perform a life-saving operation. The other patients undergoing surgery similarly depend on their caregivers, as the anesthesiologist behind the screen constantly monitors vital signs. If the heart stops, or if a reaction occurs, these patients depend on instantaneous, competent decision-making and care.

Second, these patients are *silent*. Mattie cannot, or does not, disclose her wishes or feelings. Although the attending physician presumes to know Mattie's state of mind by her guttural nonresponse to his questions, in actuality we have no idea how she is reacting—other than physiologically—to the steady stream of injections. We do not know how she regards the dying process or the decisions related to her dying. In fact, caught up in the swell of medical, legal, and ethical decision-making—all of which proceeds independent of the patient's psyche—no one has thought it important to ask.

Similarly, because the child is "under," she has no say about anything; and the parents have lapsed into paralysis. They put together a puzzle, as the surgeons put together their child. They can hope or possibly pray, but they can only do these things

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25. Cf. ROBERT M. VEATCH, 2 THE PATIENT-PHYSICIAN RELATION: THE PATIENT AS PARTNER 2 (1991) ("The term *patient* is not a good one. Etymologically it implies suffering, the connotation of passivity. But patients can be passive no longer.").

from a distance.<sup>26</sup> The anesthetized patients likewise have no voice once the anesthesia takes over; it is as if they are "not there."

Third, these patients exist at the gray edge of law and bioethics, where legal rules and ethical principles do not necessarily apply, and indeed, where the physician's emotional responsiveness may be of greater importance.<sup>27</sup> For example, it is unclear whether, as a legal matter, Mattie is "competent" or "incompetent."<sup>28</sup> The physician says she is "incompetent," but that may be a personal judgment more than a medical one. Mattie can speak, but like Herman Melville's protagonist in *Bartleby the Scrivener*, she prefers not to. Her "care"—whether she perceives it thus or not, that is the term—proceeds as if on its own volition: bleeps, injections, even the dragging of a law professor to her bedside to test his estimation of her suffering.

Likewise, children in general—as evidenced by the sign in Pediatrics—are particularly unaware of legal rights and ethical choices; they exist in the unregulated, undefined world of emotional nuance. Here, the child probably cannot imagine that she will have her entire being covered, save the disabled organ, for several hours. The parents cannot know; nor, to advocates of paternalism, should they be allowed to see. They must bide their time in the duly designated space.

Finally, these different patients lack full awareness and choice relative to decision-making about their bodies. For instance, the patients undergoing surgery probably do not know about the plastic bag over their faces, nor about the crude jokes or operating room banter. The law of informed consent does not require such disclosure;<sup>29</sup> and despite the individual's Fourteenth Amendment "liberty interest," which includes the right to refuse "unwanted medical treatment,"<sup>30</sup> the patient has no opportunity to decline, or even discover, the more tasteless aspects of the experience of surgery. Rights involving dignity are protected when the individual is competent, or even incompetent—provided the person is within view.<sup>31</sup> As Mattie is screened off from her neighbors, her muffled moans hidden behind the tubes, so the patients in surgery are screened off, and masked—literally—from others. The patients do not operate as autonomous agents; they are literally operated upon. Here the physician-patient relationship is particularly vulnerable, existing as it does beyond legal and ethical norms, and behind the scenes, and with patients who are, above all, silent and powerless.

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26. The author witnessed one surgery performed upon a diabetic ten-year-old who had undergone a dozen such procedures in the previous years. The staff knew the situation and knew the child. One of the surgeons appeared to comfort the child, calling him by name, even though the child was anesthetized. This gave the impression of caring and of valuing the child's dignity and integrity, not as a patient, but as a person.

27. BEAUCHAMP & CHILDRESS *supra* note 4, at 462; *see also supra* note 9 and accompanying text.

28. If competent, the patient has a legal right to refuse life-saving treatment. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990).

29. Informed consent only requires the physician to disclose information material to the patient's decision to submit to a particular medical procedure. *Canterbury v. Spence*, 464 F.2d 772, 786-87 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

30. *Cruzan*, 497 U.S. at 278.

31. *Cf. id.* at 286 (observing that family members "do not wish to witness the . . . [condition] of a loved one which they regard as hopeless, meaningless, and even degrading").

The law could easily monitor the surgery room, and other closed-off areas. For example, a court could decide that the right of informed consent requires doctors to make available to patients videotapes of surgeries. That way, a patient could witness whether her liberty and dignity were unfairly and needlessly assaulted during medical procedures. A patient would know, for example, whether more of her body was exposed than necessary—or what kind of jokes were told. Similarly, a legislature could decide that the right to refuse treatment requires an elderly patient's affirmative, express assent to continued medical care.<sup>32</sup>

The law's further intrusion, however, would raise additional problems. For instance, surgeons might argue that videotaping chills effective surgery. Similarly, evidence of a patient's continued wishes might be difficult to extract. The law cannot force Dr. S to ask Mattie what *she* wants, anymore than it can force Mattie's son to visit her more frequently, or force Mattie to speak, or force Mattie to respond honestly to Dr. S's questions.<sup>33</sup>

In these situations, the patients can rely on neither legal nor ethical norms; nor do the physicians have rules to guide them. The situations are shaped by individual power, a personal sense of responsibility, and by larger cultural expectations. If surgeons can lift organs up for show, and patients can be shut away from their loved ones, then perhaps we accept the situation and *expect* to give up power—and even dignity—in the operating room, or to be shunted from our children in our hour of crisis. Perhaps we expect physicians to be curegivers, and they step into the role to fulfill the unconscious bargain. Or, perhaps the fear and denial of suffering distort the experience of health "care" and transform it into one of health dependency.<sup>34</sup> Or perhaps the culture remains enmeshed in outmoded notions of physician dominance.<sup>35</sup>

The model of caregiving recognizes that patient well-being entails not only cure, but also care.<sup>36</sup> It acknowledges "compassion, fidelity, and humanity" as common denominators, across time and cultures, in the ethical aspirations of healing professionals.<sup>37</sup> A beautiful prayer encapsulates these values: "May the pain of every

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32. The challenged legislation in *Cruzan* required a guardian seeking to "discontinue nutrition and hydration of a person . . . in a persistent vegetative state," to provide "clear and convincing evidence" of what the individual's decision would have been. 497 U.S. at 284-85.

33. Given the imbalance of power and the "hopeless . . . and even degrading," *Cruzan*, 497 U.S. at 286, position into which Mattie was thrust, one wonders whether Mattie was capable of disclosing her suffering to a hostile interrogator upon whom she was dependent for life support.

34. See, e.g., RICHARD M. ZANER, ETHICS AND THE CLINICAL ENCOUNTER 3 (1988) (describing the bureaucratic, fragmented, and dehumanizing nature of modern health services).

35. See generally KATZ, *supra* note 13. Veatch observes that increasingly, patients visiting physicians are in fact healthy. They come for physical examinations, for example, or for immunizations or other services that do not suggest illness; or patients may have illnesses that are chronic and stable. Veatch notes that none of these patients are sick "to the extent of being incapable of participating actively in an ongoing patient-physician relation." Veatch thus proposes the model of active bargaining process for the physician-patient relationship. VEATCH, *supra* note 25, at 2-3.

36. See generally SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE (1992).

37. Donald Konold & Robert M. Veatch, *Codes of Medical Ethics*, in 1 ENCYCLOPEDIA OF BIOETHICS 162, 166 (Warren T. Reich ed., 1978).

living creature/ be completely cleared away./ May I be the doctor and the medicine/And may I be the nurse/ For all sick beings in the world/ Until everyone is healed."<sup>38</sup> Respect for the patient, as person, though embodied in legal rules, perhaps transcends them.

If medicine heals, it also creates a circle of interaction where, in one physician's words, "the physical does not always have the last word."<sup>39</sup> The rounds highlight, in part, our culture's overemphasis of the logical and physiological, and its denial of the analogical and psychological.<sup>40</sup> If patients were no more than magnificent machines, rather than whole persons, then a technocratic approach to health and bioethics would be called for, and any additional sensitivity wasted.

The stories will not solve ethical conflicts according to rigorous, theoretical criteria. They are not criticisms of the institution or its staff, but rather a commentary on a collective consciousness that medicalizes life and death, and that denies the language of the body, the wisdom of feeling, the truth of inner experience. I engage in storytelling more than rulemaking, for in storytelling, we reclaim the parts of ourselves that have been fragmented or denied.<sup>41</sup>

The tales suggest that persons do not begin and end at the level of skin.<sup>42</sup> Persons, as patients, experience physical, emotional, and psychological realities.<sup>43</sup> Although anaesthesia and so-called "incompetence" describe physiological and legal states, they also may be states of being that test our respect for personhood. Ideals are tested, not in litigation, but in the warp and woof of human conduct. Whether medicine and law can affirm caregiving over curegiving, and can truly embody respect for persons, is the ongoing, silent task of a bioethics of compassion.

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38. SOGYAL RINPOCHE, THE TIBETAN BOOK OF LIVING AND DYING 221-22 (1992) (quoting SHANTIDEVA, A GUIDE TO THE BODHISATTVA'S WAY OF LIFE 30-32 (Stephen Batchelor trans., 1979)). Cf. Cassell, *supra* note 18:

There is one more way by which we can know that others suffer—by directly experiencing within ourselves their feelings of desperation and disintegration, in the same manner that parents frequently experience the emotions of their children and psychiatrists of their patients. Directly experiencing the emotions of others is . . . not part of our everyday language nor of medical discourse . . . [but] this basis for compassion . . . is part of the everyday world.

Cassell, *supra* note 18, at 9.

39. LARRY DOSSEY, MEANING AND MEDICINE: LESSONS FROM A DOCTOR'S TALES OF BREAKTHROUGH AND HEALING 24 (1991).

40. Cf. ROGER J. BULGER, IN SEARCH OF THE MODERN HIPPOCRATES 153 (1987) ("The day [in the hospital] is dominated by mechanical worries, dials, buttons, and computers, all of which are essential and even vital, but none gives access to a patient's feelings. . . . [S]cientific care has eroded the human care which has always been a part of the healing process.").

41. See John Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 60 IND. L.J. 983, 1004 (1994) (describing the notion that "story or history," as opposed to "a top-down 'applied ethics' model," is the "most appropriate form of representing moral problems").

42. See JOEL FEINBERG, III, THE MORAL LIMITS OF CRIMINAL LAW, ch. 19 (1986), cited in BEAUCHAMP & CHILDRESS, *supra* note 4, at 410 (defining autonomy with reference to a zone of "breathing space" around the body).

43. See KEN WILBER, NO BOUNDARY: EASTERN AND WESTERN APPROACHES TO PERSONAL GROWTH 1-14 (1979).

#### IV. BEYOND A BIOETHICS OF COMPASSION

Postmodern scholarship has shown that different aspects of reality can be illuminated by different perspectives.<sup>44</sup> As Michael Polanyi observes, "Man lives in the meanings he is able to discern."<sup>45</sup> Previously, this Article has examined caregiving and curegiving from analytic and narrative perspectives. This Part extends the metaphor of caregiving, by exploring its meaning through myth and archetype.<sup>46</sup> Exploding ruling metaphors through such "alternative, even conflicting" perspectives can inform, enrich, and challenge unconscious legal paradigms.<sup>47</sup>

For example, my encounter with Mattie exploded the legal dichotomy between "competent" and "incompetent" patient that informs much of bioethics. While described by the attending physician as "incompetent," Mattie was in fact quite capable of communicating.<sup>48</sup> Imagine that, after meeting Mattie, I dreamed or had a vision of a magnificent lady, wearing a brilliant white gown with a blue sash, who proclaimed: "I am the Mother of all beings. It was I, standing behind Mattie, whom you recognized, as you felt the energy connect between your hand and hers; it was my hand you were

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44. See, e.g., Ben Rich, *Postmodern Medicine: Reconstructing the Hippocratic Oath*, 65 U. COLO. L. REV. 77 (1993).

45. MICHAEL POLANYI & HARRY PROSCH, *MEANING* 66 (1975). Polanyi adds: "Men believe in the reality of these meanings whenever they perceive them—unless some intellectual myth in which they also come to believe denies reality to some of them." *Id.*

46. See MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR & THEOLOGY* 17 (1985) ("Conceptual metaphors for law can circulate, diversify, increase, stimulate the creating of other metaphors, and challenge the hegemony of monolithic conceptual thinking.").

47. *Id.* at 22; see also CARL JUNG, *SYMBOLS OF TRANSFORMATION* (1956) (contrasting "directed thinking" with "dreaming or fantasy thinking").

48. Communication occurs on many levels, most nonverbal and subtle. See David Cheek, *Communication With The Critically Ill*, 12:2 AM. J. CLIN. HYPNOSIS 75 (1969). Indeed, hypnosis uses such tools as ideomotor signals—tiny, unconscious movements of the head or fingers—to communicate with the subject. See, e.g., ERNEST ROSSI, *THE PSYCHOBIOLOGY OF MIND-BODY HEALING: NEW CONCEPTS OF THERAPEUTIC HYPNOSIS* 89-91 (1987); STEPHEN GILLIGAN, *THE COOPERATION PRINCIPLE IN ERICKSONIAN HYPNOTHERAPY* 337 (1987).

Even if Mattie had *not* said, "I want to cry," she still communicated—through gesture, movement, emotion and silence. Dr. S's description of his patients as "noncommunicative" made a discussion of substituted judgment infinitely more inviting, but actually substituted banter for communication. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 284-86 (1990). Cf. GILLIGAN, *supra* at 261 (observing that a trance state can occur when "the ensuing confusion is amplified to create more uncertainty"); MICHAEL YAPKO, *TRANCEWORK: AN INTRODUCTION TO THE PRACTICE OF CLINICAL HYPNOSIS* 139 (1990) (describing "trance logic" as the "voluntary state of accepting suggestions . . . without the critical evaluation that would, of course, destroy the validity of meaningfulness of provided suggestions").

holding, as I am holding yours always, until the end of time."<sup>49</sup> Would such a dream change the analysis?

The next morning, at a neighboring hospital, an obstetrician described a new medical technology known as "multiple fetal pregnancy reduction" (MFPR). The technology arises from the woman's capacity to bear more than one fertilized egg through pregnancy at a given time.<sup>50</sup> Essentially, MFPR helps such patients bear healthy babies by "reducing" the number of embryos—e.g., arranging for destruction of excess embryos.<sup>51</sup> Typically, the selected embryos are "terminated" by injecting potassium chloride into their hearts.<sup>52</sup> The needle is passed through the mother's abdominal wall, uterus and fetal thorax.<sup>53</sup> In most cases, fetal cardiac arrest occurs immediately; otherwise, the procedure is repeated until the embryo is terminated, lest the fetus survive in a state of "permanent damage."<sup>54</sup>

Ethical issues raised by MFPR have only begun to enter the literature.<sup>55</sup> The practice has been defended on the ethical principle of proportionality, the duty to choose the course of least harm and greatest benefit to all concerned.<sup>56</sup> In assessing MFPR, our group analyzed the "maternal-fetal conflict," in which the mother's right to choose or

49. Cf. THE BASIC WRITINGS OF CARL JUNG 158-62 (Violet de Laszlo ed., 1959) (describing the *anima* or universal feminine archetype within human consciousness); JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 111 (1949) (describing the archetype of the universal mother); WILLIAM BLANK, TORAH, TAROT & TANTRA 39 (1991) (describing the *Shekhinah*, or receptive, feminine archetype).

50. Multiple fertilized eggs result in three cases: (1) naturally, when the egg splits, (2) as a side-effect of infertility medication, and (3) when the obstetrician, to increase the odds of a successful pregnancy, implants additional eggs. Interview with Dr. Graham Ashmead, Metropolitan Hospital (Cleveland) (October 6, 1994). See also M.I. Evans et al., *Selective First-Trimester Termination in Octuplet and Quadruplet Pregnancies: Clinical and Ethical Issues*, 71 OBSTET. & GYNECOL. 289 (1988) (observing that "[t]he induction of grand multiple gestations is a known complication of infertility treatments"). Dr. Ashmead reports patients carrying up to nine embryos.

51. With "quadruplets or multifetal gestations of more than five fetuses"—in other words, when four or more embryos are present—and "in multiple pregnancies bearing more than one anomalous fetus," "selective termination" of excess fetuses is deemed ethically appropriate. M.I. Evans et. al, *Attitudes on the Ethics of Abortion, Sex Selection, and Selective Pregnancy Among Health Care Professionals, Ethicists, and Clergy Likely to Encounter Such Situations*, 164:4 AM. J. OBSTET. & GYNECOL. 1092, 1092 (1991).

52. William Walters, *Selective Termination in Multiple Pregnancy*, 152 MED. J. AUSTRALIA 451, 451-52 (May 7, 1990).

53. *Id.* at 452.

54. *Id.*

55. J.C. Fletcher, *Ethical Aspects of Prenatal Diagnosis: Views of U.S. Medical Geneticists*, 14:2 CLIN. PERNATOL. 293 (1987) (calling for greater study). Obstetricians do not view MFPR as life-destroying but as life-saving: the object is to allow the mother to have one, two or possibly three healthy babies, rather than four to nine sick ones. For this reason, even "right-to-life" patients have requested the technology. Ashmead Interview, *supra* note 50. Moreover, the intention is to continue rather than terminate pregnancy. Walters, *supra* note 52, at 452. Cf. F.N.L. Poynter, *Hunter, Spallanzani, and the History of Artificial Insemination, in MEDICINE, SCIENCE AND CULTURE* 97-113 (Lloyd Stevenson & Robert Multhauf eds., 1968) (giving an historical overview of the public controversy over artificial insemination).

56. Walters, *supra* note 52, at 452; Evans et al., *supra* note 51, at 295.

refuse recommended treatment may conflict with the physician's obligation to promote the well-being of both mother and fetus.<sup>57</sup> Of course, typically, maternal-fetal conflict involves a clash of interest between the mother and the life inside her, whereas here, there are multiple potential lives, each individualized only by the extent of their "complications." As one physician notes: "[I]t is still problematic as to which particular fetuses should have their existence terminated."<sup>58</sup> Moreover, the selection process itself may affect the mother's psyche, not to mention future family dynamics.<sup>59</sup> A further complication is the legal status of potential beings. Courts seem to regard them as *between* "property" and "life"—deserving "greater respect than accorded to human tissue but not the respect accorded to actual persons."<sup>60</sup> Our own discussion plied abstraction—and the process of abstracting is, perhaps, the source of clarity, as well as artifice, in bioethics:<sup>61</sup> though the organism concerns itself with nourishment, the law confines itself to "rights."<sup>62</sup>

In a dream, from a myth-making perspective, imagine the following: I entered the feeling-state of those semi-developed, discarded units of consciousness. I felt the joy of physical embodiment, the ecstasy of incarnation. In the next moment, I suffered overwhelming, indescribable grief, as *the embryos experienced themselves* discarded, emptied of life like trash tossed from a car window. In my sense-impression, the embryos

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57. See THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS COMMITTEE ON ETHICS, PATIENT CHOICE: MATERNAL-FETAL CONFLICT, Opin. No. 55 (October 1987) [hereinafter MATERNAL-FETAL CONFLICT] (noting the increase in the possibility for such conflicts, given the increasing accessibility of the fetus to diagnostic and treatment procedures); Rosa Kim, *Reconciling Fetal/Maternal Conflicts*, 27 IDAHO L. REV. 223 (1990-91).

58. Walters, *supra* note 52, at 452.

59. Cf. LON FULLER, *LEGAL FICTIONS* 104 (1967) (affirming "the alteration that reality undergoes in our minds" as other than "falsification"); WILHELM REICH, *THE MASS PSYCHOLOGY OF FASCISM* 26 (1970) (observing that "[c]onsciousness is only a small part of the psychic life").

60. *Davis v. Davis*, 842 S.W.2d 588, 594-96 (Tenn. 1992) (quoting Report of the Ethics Committee of the American Fertility Society, 53:6 J. AM. FERTILITY SOC. 345-355 (1990)).

61. Cf. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986) (observing that legal interpretation "takes place in a field of pain and death").

62. Individual rights are "political trumps held by individuals," and exist to protect individuals from collective decisions to either deny them what they wish to have or to do, or to impose some loss or injury on them. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1978). According to legal positivism, rights thus do not have "some special metaphysical character," but rather exist "only insofar as th[ey] have been created by explicit political or social practice." *Id.* at xii. Dworkin argues that some rights are, however, "fundamental and even axiomatic," such as the "right to equal concern and respect." *Id.* See David Blickenstaff, *Defining the Boundaries of Personal Privacy: Is There a Paternal Interest in Compelling Fetal Surgery?*, 88:3 NW. U. L. REV. 1157 (1994) (arguing for a woman's right to refuse fetal surgery).

mourned the technocratic disposal process<sup>63</sup>—being treated as objects, dispatched with a shot to the heart.<sup>64</sup>

Again, do symbols, metaphors, and myth-making matter? Should a dream or trance vision shift analytical frameworks?<sup>65</sup> Does an embryo, terminated like a line of products, suffer?<sup>66</sup> Does a fly suffer as, having escaped the deadly blow of a swatter, it is being crushed by someone's heel? Does an ant experience pain when it is smushed by a child's thumb? Does an "incompetent" patient like Mattie, who admits to her doctor that she is feeling no pain, suffer? Do patients undergoing surgery suffer from barbs about their organs? Does suffering require articulation through language in order to be validated as "real"? Is consciousness limited to persons, and only ones declared legally competent?<sup>67</sup> Is the negation of suffering merely denial,<sup>68</sup> or is it, at times, a lie?<sup>69</sup>

I do not know whether abortion is a good thing or a bad thing, a moral procedure or an immoral one, a right essential to a woman's control of her body or an evil.<sup>70</sup> I make

63. "Technical civilization is man's conquest of space. . . . But time is the heart of existence. To gain control of the world of space is certainly one of our tasks. The danger begins when in gaining power in the realm of space we forfeit all aspirations in the realm of time . . . where the goal is not to have but to be, not to own but to give, not to control but to share, not to subdue but to be in accord." ABRAHAM JOSHUA HESCHEL, *THE SABBATH: ITS MEANING FOR MODERN MAN* 3 (1983).

64. Cf. Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 302 (1991) ("[M]edical technologies that shorten or risk the life of a person, or something that resembles a person, for the benefit of another . . . demonstrate that persons have noninfinite value and that people treat others as objects that can be used solely as means.") See also Margaret Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341 (1994).

65. Gilligan notes that "trance is an experiential continuum of involvement rather than an 'all or none' phenomenon." GILLIGAN, *supra* note 48, at 337. Tart goes further, arguing that "enlightenment" is a "continuum of development rather than an all-or-none state," with altered states such as hypnosis creating "jumps" in the continuum. CHARLES TART, *WAKING UP: OVERCOMING THE OBSTACLES TO HUMAN POTENTIAL* 7 (1987). Tart observes that since childhood, his subjective experience has contradicted the Western view that states such as dreaming are "not real"; he uses the term "consensus consciousness" to suggest that "ordinary consciousness" does not connote "naturalness and normality," but rather is a trance state shaped by the "consensus of belief" of Western culture. *Id.* at 5, 11.

66. The ACOG opinion speaks in terms of "jeopardiz[ing] the fetus," "distress or deterioration," "fetal interests," "fetal needs," and "welfare of the fetus." *MATERNAL-FETAL CONFLICT*, *supra* note 57.

67. Cf. SWAMI MUKTANANDA, *PLAY OF CONSCIOUSNESS* 5 (1978) (describing all creation as conscious); Walt Whitman, *Leaves of Grass* (1855) ("I bequeath myself to the dirt to grow from the grass I love,/If you want me again look for me under your boot-soles.").

68. Cf. GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* 26 (1978) ("Though subterfuge may bring us peace, for a while, it is honesty which causes the tragic choice to reappear . . . [and] permits us to know what is to be accepted and, accepting, to reclaim our humanity and struggle against indignity.").

69. Cf. HANNAH ARENDT, *TOTALITARIANISM* 111 (1968) ("Systematic lying to the whole world can be safely carried out only under the conditions of totalitarian rule, where the fictitious quality of everyday reality makes propaganda largely superfluous.").

70. For differing religious views, see Laura Bishop & Mary Coutts, *Religious Perspectives on Bioethics*, 4:2 KENNEDY INST. OF ETHICS J. 155 (1994) (describing attitudes towards reproductive and other technologies in African religious traditions, Bahai Faith, Buddhism and Confucianism, Eastern Orthodoxy, Hinduism, Islam, Jainism, Judaism, Native American religious traditions, Protestantism, and Roman Catholicism). Cf. AMERICAN

no judgment on MFPR or selective termination.<sup>71</sup> Similarly, I do not judge whether Mattie's care was "reasonable under the circumstances."<sup>72</sup> From a myth-making perspective, all beings experience trauma, whether their pain is intelligible to their human caretakers, or not,<sup>73</sup> and although legal rules circumscribe choices, humans choose how to act in a realm infinitely larger than rules can dictate.

What links the excess embryos to Mattie, the children, and the surgery patients, from a myth-making perspective, is that their experience of care occurs in a consensus reality that denies their capacity to feel and suffer. The embryos are simply "multifetal gestations";<sup>74</sup> Mattie, the children, and the surgery patients are "tuned out." Their objectification results from a reduction of "care," as a ruling metaphor, to "medical care";<sup>75</sup> from an overly mechanistic view of their condition;<sup>76</sup> from the denial that they have, at the moment of care, a consciousness of that care. Their dignity, if you will, is impinged because in treating them as objects of technological intervention, their aliveness is ignored—*e.g.*, the euphemism "reduction" as substitute for "destruction"; the terms "incompetent" and "noncommunicative" as medical pronouncements rather than functional realities; the reference to the body part, rather than the person (the "penile implant in O.R. 23").<sup>77</sup>

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MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS, Opin. 2.01 (1994) ("[T]he Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law.").

71. Indeed, one can hardly frame the language of "rights" to this analysis. On one side, there is the couple's interest in a healthy baby; on the other side, the egg's right to avoid being fertilized, only to be "selectively terminated." "Egg rights" arguably are no less compelling than "fetal rights," particularly in light of the difficulty in determining the moment at which the latter rights attach. *See* Charles Kester, *Is There a Person in That Body? An Argument for the Priority of Persons and the Need for a New Legal Paradigm*, 82 GEO. L.J. 1643, 1650, 1681-83 (1994) (rejecting "viability" as a criterion for granting legal standing to the fetus, and arguing that fetuses, once they develop brain function, should be "presumed to possess . . . consciousness," and hence be recognized as persons with legal standing).

72. Mattie probably received the standard of care customary in the locality. *See* Smith v. Menet, 530 N.E.2d 277 (Ill. App. 2 Dist. 1988) (describing the standard of care in medical malpractice).

73. Cf. HUSTON SMITH, THE RELIGIONS OF MAN 148 (1989) (describing Buddha's First Noble Truth, that life is suffering). In Sanskrit, the word *budh* means both to wake up and to know; hence, Buddha is the Awakened One. *Id.* at 122.

74. *See supra* note 51.

75. *See* Eric Cassell, *The Sorcerer's Broom: Medicine's Rampant Technology*, 23:6 HASTINGS CENTER REP. 32 (1993) (describing the reduction of "human illness" to "the biological problem of disease").

76. *See infra* note 81.

77. An obstetrician who attempts to commune, on an inner level, with embryos—to inform himself of their experience and inform them of medical alternatives—might be regarded in the same vein as a person who talks to plants; or to pets (which may be more common); or to themselves (which most of us do mentally rather than out loud, thus avoiding a DSM-IV diagnosis). Cf. R.D. LANG, THE POLITICS OF EXPERIENCE 121 (1967) (describing schizophrenia as a "political event," a "social prescription that rationalizes a set of social actions whereby the labeled person is annexed by others . . . into a role"); MIRCEA ELIADE, THE SACRED AND THE PROFANE 209 (1957) ("A purely rational man is an abstraction; he is never found in real life.").

Moral progress, it has been argued, "often depends as much on finding (or fashioning) the right words as on applying the right principles."<sup>78</sup> In many cases, the care itself may be the intervention;<sup>79</sup> the kind behavior within the boundaries of the rule may be the moral good; and decision-making may be less important than simply communicating.<sup>80</sup>

Debates on *rights* and decision-making *power* often obscure intersubjective realities, whether the subject is an elderly woman, a naked, pre-op patient, or an embryo. If myth, archetype, metaphor, and feelings matter, then the analysis shifts from rights and power to embrace perceptual realities.<sup>81</sup> For instance, insisting on the state's so-called interest in prolonging life shifts to enhancing the quality or radiance of one's final moments;<sup>82</sup> and concern in "physician-assisted suicide" debates about altering the "natural course" of illness yields to concern for furnishing dignity, comfort, and peace in dying.<sup>83</sup> These propositions challenge the conventional view of the physician's role as "healer,"<sup>84</sup> and underscore the notion that mythical, archetypical and intersubjective realities can, and should, play a role in medical care and bioethical decision-making.<sup>85</sup> Perhaps the personal sphere must reclaim power ceded to the medical. Perhaps MFPR is more than "intervention";<sup>86</sup> perhaps the decision to end one's life is not "suicide," the decision to

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78. See Arras, *supra* note 41, at 997.

79. See EMPATHY AND THE PRACTICE OF MEDICINE: BEYOND PILLS AND THE SCALPEL (Howard M. Spiro et al. eds., 1993).

80. For example, in Mattie's situation, the ethical issue is not whether someone else has the right to disconnect her life support, but whether someone has the right to pronounce her as good as dead. Cf. Kester, *supra* note 71, at 1667 (proposing that "[a]n individual whose body is irreversibly . . . incapable of sustaining the functions necessary for consciousness is not a person").

81. See Arras, *supra* note 41, at 997-98 (describing such a shift in ROBERT BURT, TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS (1979)). Arras notes that Burt "enlarged the understanding" of autonomy by "attempting to place the patient's treatment refusal in an emotional context," rather than resorting to "a mechanical application of the principle." Arras, *supra* note 41, at 997-98.

82. This is the position taken by those who practice *phowa*, the transference of consciousness at the moment of death: prolonging life is less important than providing a peaceful atmosphere for the dying process. See RINPOCHE, *supra* note 38, at 231-35, 372.

83. See generally Quill, *supra* note 19. Indeed, according to some, what happens just before, during, and after death is of "immense importance": life-sustaining treatment that "merely prolongs the dying process may only kindle unnecessary grasping, anger, and frustration in a dying person." RINPOCHE, *supra* note 38, at 372. Rinpoche argues that "[p]eaceful death is really an essential human right." Cf. Daniel Callahan, *Pursuing a Peaceful Death*, 23:4 HASTINGS CENTER REP. 33, 34 (1993) (observing that the process of dying is "deformed" by "technological brinksmanship").

84. See, e.g., AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS: REPORTS, Rep. 59 (July 1994) (rejecting "physician-assisted suicide" as "fundamentally inconsistent with the professional role of physicians as healers").

85. See, e.g., NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS & MORAL EDUCATION 79-103 (1984); Birgit Victor, *Theoretical Discussion of a Model of Caring for Persons with HIV Infection*, 7 SCAND. J. CARING SCI. 243 (1993).

86. In fact, the intervention determines which of the embryos within the family will develop into "persons," thus eliminating future siblings and initiating a whole array of family dynamics. Since courts have

guide the dying process is not necessarily "killing,"<sup>87</sup> and the notion of death as either nothingness or heaven is limiting and reflective of cultural taboos and Western belief systems.<sup>88</sup> Perhaps "healing" refers not to a particular technology, medication or procedure, but rather to a process of moving towards wholeness at all levels of being.<sup>89</sup> Perhaps such movement can, and should, force Western culture to reexamine its assumptions<sup>90</sup> about life and consciousness.<sup>91</sup>

The conventional wisdom is dualistic: one is either *for* something, or against.<sup>92</sup> Humans have slaughtered each other for millenia, for such differences in belief.<sup>93</sup> Being for or against something never gave rise to compassion, a fountainhead of religious feeling<sup>94</sup> and bioethics.<sup>95</sup> A myth-making perspective suggests that the embryos suffered; that Mattie suffered; that the woman whose organs were yanked up into the air by the

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imposed a duty on the physician to avoid injury to the fetus, if embryos are considered persons, a conflict of interest arises between the various candidates. *See Jeffrey Phelan, The Maternal Abdominal Wall: A Fortress Against Fetal Health Care?*, 65 S. CAL. L. REV. 461, 472 (1991) (citing cases).

87. *See Arras, supra* note 41, at 997 ("Is the withholding of artificial nutrition through a nasogastric tube an example of intentional 'killing' or an example of a humble, merciful withdrawal of ineffective medical treatments?").

88. *See generally* ERNEST BECKER, ESCAPE FROM EVIL (1975) (describing the denial of death in American culture); ELIZABETH KUBLER-ROSS, ON DEATH AND DYING (1979).

89. *See generally* DOSSEY, *supra* note 39 (describing meaning in medicine); KENNETH PELLETIER, HOLISTIC MEDICINE 23-39 (1979) (critiquing the Newtonian view of disease as mechanical and reductionist, and advocating a new medical model integrating prevention, lifestyle modification, psychological counseling, and supporting patient responsibility for self-care).

90. *See Arras, supra* note 41, at 995 (noting the effect of culture on bioethical principles and theorizing).

91. Indeed, the "universal" experience of death—as expressed in dreams, poetry and recurrent world myths—is that death "is never seen to stand alone as a final act of annihilation," but rather occurs in a cycle of death and rebirth, with initiation from one stage of development to another, and hence, redemption. JOSEPH HENDERSON & MAUD OAKES, THE WISDOM OF THE SERPENT: THE MYTHS OF DEATH, REBIRTH & RESURRECTION 4 (1963). Thus, the compassion or consciousness with which one ends life matters to the organism, just as the compassion or consciousness that attends birth is significant. Cf. WILHELM REICH, CHILDREN OF THE FUTURE: ON THE PREVENTION OF SEXUAL PATHOLOGY 3-4 (1983) (describing birth-related trauma).

92. Cf. Stefano Rodota, *Cultural Models and the Future of Bioethics*, 10 J. CONTEMP. HEALTH L. & POL'Y 33, 33 (1994) (referring to stances such as that of the Catholic Church which "bundl[e] together abortion, contraception, euthanasia and reproduction technologies and rejec[t] them wholesale"); Kester, *supra* note 71, at 1676 (citing "sincerely held but incompatible views" as to whether fetuses are "persons").

93. Cf. GOPI KRISHNA, REASON AND REVELATION 43 (1979) ("It is the human ego, with its intolerance of other's views, that is often responsible for the battles and wrangles in the domain of knowledge. Almost every great thinker, skilled in penmanship, with appropriate arguments tries to win finality for his views. This is an incorrigible habit of reason. It can never be stilled into that perfect calm which knows that the search is over.").

94. *See generally* SMITH, *supra* note 73.

95. *See, e.g.*, Alexander Capron, *Easing the Passing*, 24:4 HASTINGS CENTER REP. 25 (1994) (describing "compassion in dying" as ground for legalizing medically-assisted death).

surgeon—whether or not she was consciously aware—suffered. Awareness of suffering cannot be evoked by legal rules, cannot be circumscribed by bioethics, cannot be taught at the blackboard. The placard in the Pediatrics operating room expressed it well: “Talk to Me. Comfort Me. I could be *your* child.” In short, caregiving—through the lens of dream, emotion, and myth—includes transcending hierarchical relations and dependencies through the immediate, body- and feeling-centered awareness of our shared vulnerability.

### CONCLUSION

Whether motivated by external rules or inner guidelines, autonomy, nonmaleficence, beneficence, and justice do, on one hand, express a quest to encourage compassionate caregiving. On the other hand, emotional responsiveness transcends principles.<sup>96</sup> To unite principles with responsiveness suggests being willing to acknowledge both parts of one’s being: the professional and the shaman, the core that is at once institutional and healing.<sup>97</sup> The professional helps individuals surmount problems by manipulating technological or institutional know-how;<sup>98</sup> the shaman—the “medicine man” or “witch doctor”—helps individuals transcend their normal, ordinary definition of reality, by moving easily between ordinary and nonordinary states of consciousness.<sup>99</sup>

When shamans enter nonordinary reality, the rules of the outer world are suspended. Horses fly, plants talk, fairies and leprachauns abound. Time as we know it is suspended. . . . Outer rules of space are equally voided in these nonordinary worlds.<sup>100</sup>

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96. *See supra* note 9 and accompanying text.

97. For examples of this dual identity, see KYRIACOS C. MARKIDES, *THE MAGUS OF STROVOLOS: THE EXTRAORDINARY WORLD OF A SPIRITUAL HEALER* (1985) (sociology professor’s initiation into Christian spirit mysteries); ANDREW HARVEY, *HIDDEN JOURNEY* (1992) (Oxford professor’s initiation by Indian guru); TART, *supra* note 65 (psychology professor’s initiation into trance states through Gurdieff work).

98. *See generally* BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION* (1976).

99. MICHAEL HARNER, *THE WAY OF THE SHAMAN* xvii-xix (1990). Shamanism does not require “faith,” but rather rests on one’s own experience of different states of consciousness. *Id.* at xix. Harner notes that it is “unnecessary and even distracting to be preoccupied with achieving a scientific understanding of what ‘spirits’ may really represent and why shamanism works.” *Id.* at xxiii.

100. SANDRA INGERMAN, *SOUL RETRIEVAL: MENDING THE FRAGMENTED SELF* 33 (1991). Eliade notes: “The shaman is, therefore, the man who can die, and then return to life, many times . . . . Through his initiation, the shaman learns . . . what he must do when his soul abandons his body—and, first of all, how to orient himself in the unknown regions which he enters during his ecstasy.” MIRCEA ELIADE, *DEATH AND REBIRTH* 95 (1958) (*quoted in* HENDERSON & OAKES, *supra* note 91, at 207)).

The shaman is a healer.<sup>101</sup> Shamanic cultures existed long before written history, and believed all things to be permeated by Spirit.<sup>102</sup> Physicians, as healers, are their modern counterparts.<sup>103</sup> So are psychotherapists,<sup>104</sup> and even lawyers.<sup>105</sup>

In each case, the dual identity—professional and shaman—has an overt side and a covert side. The professional (overt) side publishes in respectable journals, articulates ideas in neat intellectual packages, impresses with credentials and a detached, neutral language; the shamanistic (covert) side delves into dream, myth, fantasy and archetype, plunges into metaphor, nurtures the inner landscape, and allows the “inexhaustible energies of the cosmos”<sup>106</sup> to pour through his or her being.

This duality expressed itself at the medical facility, where the professional-shaman identity was split, often between husband and wife, or between physician-professional and physician-private citizen. Although the senior physician expressed little interest in holistic medicine, his wife, a cancer survivor, practiced yoga and wore an angel on her necklace. Another physician, a cardiologist, was fascinated by “the possibility that something beyond, that we cannot prove, exists”; he had me speak to his wife, who had premonitory dreams on a regular basis. A third physician, who was born in India, quoted the *Vedas* to me, and privately observed: “The universe gives you a little bit of knowledge to play with, and watches what you do with it.” Quietly, covertly, behind the machinery and the titles, far from the gaze of committees and the Annual Physician Review (which rewarded, among other things, patient volume),<sup>107</sup> lurked the spectre of the inner, the hidden, the whole being behind the instrumentation.

It is true that “cultural models that are adopted, consciously or otherwise,” affect one’s views in bioethics.<sup>108</sup> I share the myth-making to honor the shaman in self and others; to bring the covert into the overt; to validate subjectivity, intuition, and mystery

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101. HARNER, *supra* note 99, at xxiii.

102. INGERMAN, *supra* note 100, at 17.

103. Cf. IN SEARCH OF THE MODERN HIPPOCRATES 122 (Roger J. Bulger ed., 1987) (observing that “a real cure emerges by virtue of a relationship that will be beneficial to both patient and doctor”). Bulger emphasizes physicians’ reliance on the placebo effect—the “therapy of the word”—as the most powerful healing tool, and observes that western medicine’s association with action rather than words creates “a most peculiar and persistent separation of medicine from the great healers and healing associated with religion and religious leaders.” *Id.* at 121-22.

104. See HARNER, *supra* note 99, at xviii.

105. See Patricia King, *Rights Within the Therapeutic Relationship*, 6:1 J. LAW & HEALTH 31, 31 (1991-92) (arguing that conceiving autonomy in terms of a “narrow image of rights . . . independent of care” distorts therapeutic relationships and “makes implementation of rights, as expressed in this individual autonomous model, impossible”). Judicial language, particularly in cases involving mental illness, “tells only part of the truth of the human experience. . . . [E]ach articulates some dimension of human experience but no one articulates the wholeness of human experience.” *Id.* at 57. Rather than protecting autonomy, this disconnects persons from relationships where “their autonomy might flourish.” *Id.*

106. CAMPBELL, *supra* note 49, at 3.

107. We were told of a physician who spent too much time with her patients. She was told to either increase her efficiency, or accept a salary cut; she chose the latter.

108. Rodota, *supra* note 92, at 33.

in equipoise to science and law. By acknowledging these other dimensions of caregiving, the field of knowing may be broadened and enriched.<sup>109</sup>

From Dr. S's insensitivity to Mattie's suffering, to Dr. P's insistence that only things of *medical* relevance have significance, the stories reflect our culture's reliance on outer pronouncements rather than inner truths.<sup>110</sup> The children's crayon drawings provide as much a representation of their medical care as an article in *JAMA* or a law review. East *has* met West, contrary to Rudyard Kipling's famous lines, and, if we consider East and West to be metaphors for the journey within, perhaps our age will acknowledge a greater integration between, science and intuition, intellect and feeling.<sup>111</sup> Ascribing legal "personhood" to a fetus is one thing,<sup>112</sup> relating as one form of consciousness to another, dimly understood form, is another.<sup>113</sup> In any event, the more deeply we delve into human consciousness, the more clearly we can shape legal rules to reflect essential values.<sup>114</sup>

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109. I am also challenging three premises of conventional wisdom which are embedded in the stories, namely:

1. Anything not subject to scientific proof (e.g., the angel on the necklace) is a matter of personal belief and hence irrelevant to healing and/or rule-making.
2. All intersubjective experience (e.g., the dream of the lady in blue and white) must fit into a well-defined belief system adopted by a mainstream religious body. As a corollary, mystical experience is "religious," and hence, not real.
3. All legal rules must be "neutral," free from inner vision, body wisdom, and feeling; distinctions are rational and made on a purely intellectual basis, without regard to unconscious and archetypical elements.

*Cf.* JOHN HERMAN RANDALL, JR., THE MAKING OF THE MODERN MIND 282-307 (1976) (describing the "deification of reason").

110. Martin Buber writes that humans live in "two tidily circled-off provinces, one of institutions and the other of feelings—the province of *It* and the province of *I*." MARTIN BUBER, I AND THOU 43 (2d ed. 1958). According to Buber, feelings are "'within,' where life is lived and man recovers from institutions." *Id.*

111. The Western notion of personhood dismisses subjectivity and "sharply opposes reality and nonreality," asserting that "imagining, dreaming, and hearing voices, for example, are not 'real.'" Willy DeCraemer, *A Cross-Cultural Perspective on Personhood*, 61 MILBANK FUND Q./HEALTH & SOC. 1, 21 (1983). Central African and Japanese perspectives, by way of contrast, emphasize the "'inner,' emotive, symbolic, and ritual aspects" of personhood in society. *Id.* at 32.

112. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 95-96 (1985) (quoted in Rodota, *supra* note 92, at 34) (arguing that the United States Supreme Court in *Roe v. Wade* should have "simply denied that fetuses were alive," leaving "unprovable, metaphysical arguments" to the people, rather than proclaiming that "anti-abortion beliefs as to commencement of life, *whether true or not*, are part of our Constitution").

113. Buber critiques the manipulative, ends-oriented view of life: "If a man lets it have the mastery, the continually growing world of *It* overruns him and robs him of the reality of his own *I*, till the incubus over him and the ghost within him whisper to one another the confession of their own non-salvation." BUBER, *supra* note 110, at 46. Buber describes the *I-Thou* relationship as one in which the "whole being" participates; thus, "[a]ll real living is meeting." BUBER, *supra* note 110, at 3, 11.

114. Only beings recognized as having "conscious awareness" can have legally cognizable interests. BONNIE STEINBOCH, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS 14 (1992). Thus we must understand consciousness to determine whether legal interests pertain. *See id.* Some argue, for example, that anencephalic infants should be harvested for organ donation, because, like Mattie, they "experience no pain

The patient is more than the physical body,<sup>115</sup> and beyond scientific proof, is the proof of the heart.<sup>116</sup> Before the law, stands a doorkeeper,<sup>117</sup> filtering unconscious impressions and condensing experience into rules and phrases, and beyond a bioethics of compassion, is compassion itself.

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or suffering, and therefore, can never be aware of what happens to them." *Id.* at 33 (quoting RONALD CRANFORD & JOHN ROBERTS, USE OF ANENCEPHALIC INFANTS AS ORGAN DONORS: CROSSING THE THRESHOLD, IN PEDIATRIC BRAIN DEATH AND ORGAN TISSUE RETRIEVAL: MEDICAL, ETHICAL AND LEGAL ASPECTS 193 (1989)). A bill recently was introduced to classify infants with anencephaly as dead. *Id.* at 31.

115. *See supra* note 42 and accompanying text; *see also* Cohen, *supra* note 13, at 88-97 (describing human energy fields).

116. An Israeli poet writes: "'Where do you feel your soul?'/Stretched between mouth-hole and ass-hole/a white thread, not transparent mist,/squeezed into a corner between two bones/in pain./ When satiated, vanishing like a cat./ I belong to the last generation/to separate body and soul." YEHUDA AMICHAI, TRAVELS 53 (Ruth Nevo trans., 1986).

117. Franz Kafka, *Before the Law*, in KAFKA: THE COMPLETE STORIES 3 (1971).

## NOTES

### LEGALIZING PATENT INFRINGEMENT: APPLICATION OF THE PATENT EXHAUSTION DOCTRINE TO FOUNDRY AGREEMENTS

R. TREVOR CARTER\*

#### INTRODUCTION

The United States Court of Appeals for the Federal Circuit recently decided the case of *Intel Corp. v. ULSI Systems Technology, Inc.*,<sup>1</sup> which addressed the patent exhaustion doctrine in the context of a patent cross-licensing agreement. The patent exhaustion doctrine provides that an authorized sale of a patented product places that product beyond the reach of the patent.<sup>2</sup> Patent cross-licensing agreements are intended to allow the parties to the agreement to concentrate on developing products rather than litigating patent rights. These agreements create an environment for producing new and useful inventions and help companies to compete in an increasingly aggressive world-wide marketplace.

In *ULSI*, Intel and Hewlett-Packard (HP) entered into a cross-licensing agreement in which they granted to each other all rights "under all patents and patent applications having an effective filing date prior to January 1, 2000."<sup>3</sup> ULSI, a design firm with little or no manufacturing capacity, designed a product which infringed an Intel patent. Under patent law, ULSI could not make, use or sell its newly designed product.<sup>4</sup> However, ULSI entered into a foundry agreement with HP whereby HP manufactured ULSI's infringing product. Intel filed a patent infringement suit against ULSI alleging that ULSI's product infringed its patent. The United States District Court for the District of Oregon, granted Intel a preliminary injunction.<sup>5</sup>

ULSI argued that the Intel-HP cross-license agreement permitted it to act as a foundry to manufacture the ULSI designed product and that, under the patent exhaustion doctrine, HP's shipment of the product was a "first sale" that extinguished Intel's patent rights with respect to those products. In essence, ULSI claimed that due to the patent exhaustion doctrine HP's license with Intel sanitized its infringing product.

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1. 995 F.2d 1566 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 923 (1994).
2. *See Hobbie v. Jenson*, 149 U.S. 355 (1893); *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873); *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1882).
3. *ULSI*, 955 F.2d at 1567.
4. 35 U.S.C. § 271(a) (1988) ("[W]hoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.").
5. *Intel Corp. v. ULSI Sys. Technology, Inc.*, 782 F.Supp. 1467 (D. Or. 1991), *rev'd*, 995 F.2d 1566, *cert. denied*, 114 S. Ct. 923 (1994).

The Court of Appeals for the Federal Circuit agreed with *ULSI* in a 2-1 decision.<sup>6</sup> However, the majority opinion puts into question how existing cross-licensing agreements will be interpreted. In his dissent, Judge Plager stated, “*ULSI* has managed to take a shield the law provides to purchasers of products containing patented inventions and turn it into a sword to cut off legitimate rights of the patent owner.”<sup>7</sup>

This Note examines *ULSI*’s implications on patent procurement and the use of patent cross-licensing agreements. Further, this Note discusses the evolution of the patent exhaustion doctrine and analyzes its application to cases such as *ULSI* involving unlicensed third parties sanitizing infringing products through foundry agreements. Finally, this Note suggests guidelines for courts to follow when presented with an unlicensed third party sanitizing products through a licensed foundry. This Note concludes that, as a matter of policy, *ULSI* was decided incorrectly and, therefore, should be strictly limited to its facts or, preferably, overruled.

## I. THE PATENT SYSTEM

### *A. Policy Foundations*

The framers of the Constitution established the patent system in August 1787 at the Constitutional Convention: “The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>8</sup> Congress implemented the Framers’ stated purpose by providing that a utility patent shall grant the patentee the right to exclude others from making, using or selling the invention for a term of seventeen years.<sup>9</sup>

Both the inventor and the public benefit from the procurement of patents. The inventor benefits by receiving a seventeen-year right to prevent others from making, using or selling his invention.<sup>10</sup> The public benefits by obtaining a detailed disclosure of the invention from the inventor in the form of a written description that enables any “person skilled in the art . . . to make and use” the invention and that sets forth the “best mode” of carrying out the invention known to the inventor at the time the patent application is filed.<sup>11</sup>

The patent system also provides a series of practical economic benefits.

[The] patent system . . . continu[es] to provide an incentive to research, development, and innovation . . . [that has] no practical substitute for the unique services it renders. First, a patent system provides an incentive to invent by offering the possibility of reward to the inventor and to those who support him. This prospect encourages the expenditure of time and private risk capital in research and development efforts. Second, . . . a patent system stimulates the

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6. *ULSI*, 995 F.2d at 1571.

7. *Id.*

8. U.S. CONST. art. I, § 8, cl. 8.

9. 35 U.S.C. § 154 (1988).

10. *Id.*

11. 35 U.S.C. § 112 (1988).

investment of additional capital needed for further development and marketing of the invention [by assuring that the patent owner will have the exclusive right to the invention for seventeen years]. Third, by affording protection, a patent system encourages early public disclosure of technological information, some of which might otherwise be kept secret. Early disclosure reduces the likelihood of duplication of effort by others and provides a basis for further advances in the technology involved.<sup>12</sup>

The success of the patent system is the result of granting inventors the right to exclude others from making, using and selling their inventions for seventeen years.<sup>13</sup> Therefore, courts should be careful about creating precedent which limits a patent owner's right to exclude because it may serve as a disincentive to patent procurement.<sup>14</sup>

#### *B. The Right To Exclude Others and The Problem Of Improvement Patents*

The right that a patent gives the patent owner is described as a negative right because it permits the patent owner to prevent others from making, using or selling the invention, but it does not give the patent owner the right to make, use or sell the invention.<sup>15</sup>

A patent is infringed only if "every [element or] limitation set forth in a [patent] claim<sup>16</sup> [is] found in an accused product or process exactly or by a substantial equivalent."<sup>17</sup> It is possible to obtain a patent on a product even though that product infringes a prior patent. This type of patent is usually an improvement over the prior patent.<sup>18</sup> A patent claim in the improvement patent typically includes all the limitations or elements set forth in the prior patent and additional limitations (directed to the

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12. The Report Of The President's Commission on the Patent System, November 17, 1966, *reprinted in*, ROBERT A. CHOATE ET AL., PATENT LAW: TRADE SECRETS – COPYRIGHTS – TRADEMARKS 79 (2d ed. 1981). The President's Commission on the Patent System was established in April, 1965 by President Lyndon B. Johnson.

13. In *Grant v. Raymond*, 31 U.S. 218 (1832), Chief Justice Marshall stated that:

[T]he settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in the patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions.

*Id.* at 241-42.

14. See *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) ("It is the duty of the Commissioner of Patents and of the courts in the administration of the patent system to give effect to the constitutional standard by appropriate application, in each case, of the statutory scheme of the Congress.").

15. See *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 935 n.15 (Fed. Cir. 1991) ("A patent provides only a right to exclude others from practicing the invention for a limited time.").

16. A "claim" is a portion of the patent which "point[s] out and distinctly claims[s] the subject matter which the applicant regards as his invention." 35 U.S.C. § 112 (1988).

17. Robert L. Harmon, *Seven New Rules of Thumb: How The Federal Circuit Has Changed The Way Patent Lawyers Advise Clients*, 14 GEO. MASON U. L. REV. 573, 576 (1992) (citing *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1577 (Fed. Cir. 1989)).

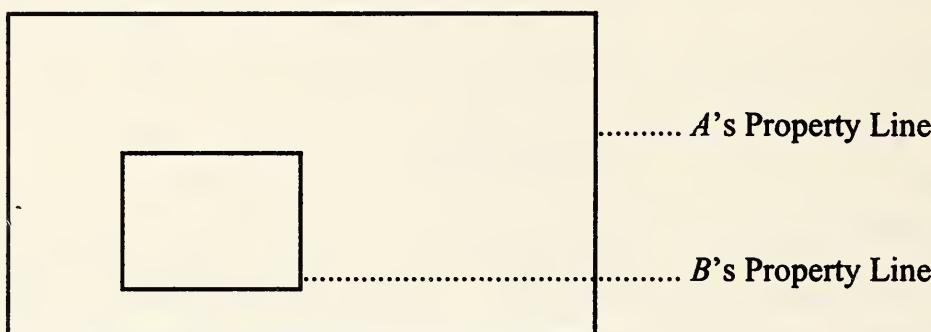
18. To be patentable, an invention must be: (1) novel, (2) nonobvious and (3) useful. 35 U.S.C. §§ 101-103 (1988).

improvement) that make the improvement patent claim patentable. Even though the improvement is patentable, the improvement patent owner would infringe the prior patent by making, using or selling his new invention.<sup>19</sup>

Where a patent improves upon a prior patent, the Supreme Court observed in *Cantrell v. Wallick*<sup>20</sup> that “[t]wo patents may both be valid when the second is an improvement on the first, in which event, if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent.”<sup>21</sup> Thus, the patent owner of the improvement has developed an invention that he cannot make, use or sell unless he obtains a license to make, use or sell the invention covered in the prior patent.<sup>22</sup>

The patent law right to exclude others from making, using or selling is analogous to trespass in real property law.

FIGURE 1



In Figure 1, patent owner *A* obtained a “broad” patent as denoted by his analogous real property lines.<sup>23</sup> Patent owner *B* obtained a “narrower” patent that was an improvement over *A*’s patent.<sup>24</sup> *B*’s analogous “narrower” real property lines are surrounded by *A*’s analogous “broader” real property lines.

In the patent law context, *B*’s “narrower” invention infringes *A*’s “broader” patent. In the analogous real property context, *B* cannot reach his property without trespassing on *A*’s property. In the patent law context, *A* can make, use or sell everything covered by the “broad” patent except *B*’s “narrower” improvement patent. To do so would infringe *B*’s patent. In the real property context, *A* can travel across all the property within *A*’s real property lines except the area within *B*’s real property lines. To do so would be trespassing on *B*’s land.

19. *Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 879 n.4 (Fed. Cir. 1991) (“[T]he existence of one's own patent does not constitute a defense to infringement of someone else's patent. It is elementary that a patent grants only the right to exclude others and confers no right on its holder to make, use, or sell.” (emphasis in original)). *See* text accompanying *supra* note 15.

20. 117 U.S. 689 (1886).

21. *Id.* at 694.

22. *Milliken Research Corp. v. Dan River, Inc.*, 739 F.2d 587, 594 (Fed. Cir. 1984) (“[A] product may infringe more than one patent and . . . one may not be able to practice the invention protected by a patent directed to an improvement of another's patented article or method except with a license under the latter.”).

23. *See supra* text accompanying note 15.

24. *See supra* text accompanying note 15.

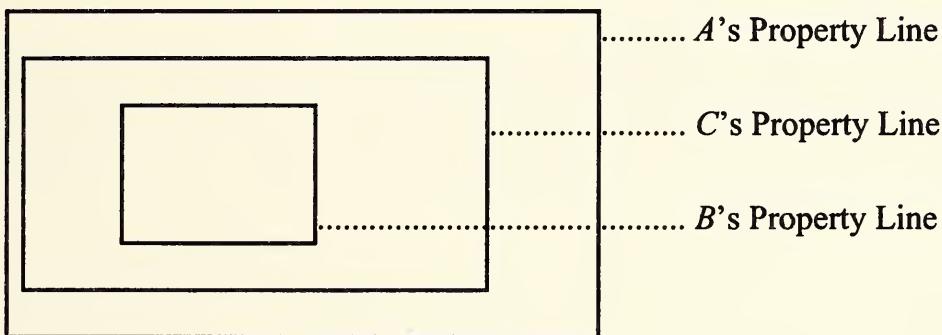
### C. Patent Licensing Agreements

The above-described situation occurs frequently today as companies continuously improve each other's existing patented technology. To resolve the dilemma, companies often enter into licensing and cross-licensing agreements.<sup>25</sup>

A patent license is a promise by a licensor/patent owner not to sue the licensee for making, using or selling the invention.<sup>26</sup> Although a license does not affirmatively grant the right to *B* to make, use, and sell *A*'s invention, it is a promise by *A* that he will not sue *B* for patent infringement if *B* makes, uses or sells *A*'s invention.<sup>27</sup> Anyone who makes, uses or sells the product without a license is liable to the patent owner or his assigns for infringement.<sup>28</sup>

Continuing the example from Figure 1, if *A*'s invention were licensed to *B*, then *B* could make, use or sell anything within *A*'s analogous property lines, including *B*'s invention, without fear of a patent infringement suit from *A*.<sup>29</sup> In this situation, however, *A* may not make, use or sell *B*'s invention because *B* has not given *A* permission to do so.<sup>30</sup> If the consideration *A* receives for his license to *B* is the right to make, use or sell *B*'s invention, then a cross-license is formed. A patent cross-licensing agreement is simply an exchange of licenses by two or more patent owners.<sup>31</sup> Under the cross-license, *A* and *B* can both make, use or sell anything within *A*'s analogous property lines without fear of suit from each other.

FIGURE 2



25. See *supra* note 22.

26. ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 210-211 (2d ed. 1991) (citing Fromson v. Western Litho Plate & Supply Co., 853 F.2d 1568 (Fed. Cir. 1988), and Spindelfabrik S.-S. & G. v. Schubert & Salzer Mas. Ak., 829 F.2d 1075 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988)).

27. *Id.*

28. See *Western Elec. Co. v. Pacent Reproducer Corp.*, 42 F.2d 116 (2d Cir. 1930), *cert. denied*, 282 U.S. 873 (1930) (The court held that a license to practice a patent merely protects a licensee from a claim of infringement by the owner of the patent; it does not grant him an interest in the patent.); 35 U.S.C. § 271(a) (1988) ("Except as otherwise provided in this title, whoever *without authority* makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." (emphasis added)).

29. See *supra* note 26 and accompanying text.

30. See *supra* note 28 and accompanying text.

31. BLACK'S LAW DICTIONARY 376 (6th ed. 1990).

Figure 2 adds patent owner *C* to the situation described in Figure 1. Patent owner *C* obtained a patent as denoted by *C*'s analogous property lines. If *A* and *B* enter into a cross-license, *A* or *B* could still be sued by *C* for patent infringement if they make, use or sell *C*'s patented invention.<sup>32</sup>

#### *D. Intellectual Property in the Business Setting & Cross-Licensing*

Intellectual property is a valuable corporate asset that is the foundation for the success of many companies. This success is based on a product or service that is protected by a patent, copyright or trademark. Therefore, the existence and worth of most high technology business entities are based, in large part, on the quality and quantity of intellectual property they own.<sup>33</sup> For this reason, business entities have been taking a more aggressive approach to building patent portfolios.<sup>34</sup> A strong patent portfolio allows a company to build a strong product and service base, to license its technology for royalty revenues, and to establish cross-license agreements with other companies.

Companies enter into patent cross-licensing agreements to expand the scope of technology they may use in their products or services. As discussed above, a company may obtain a patent for an improvement of a prior patent but be unable to make, use or sell the invention because the company does not own the rights to the prior patent.<sup>35</sup> Generally, each company in a patent cross-licensing agreement grants the other company the rights to its patents for a specified term. Therefore, a cross-licensing agreement removes the concern a company has of infringing the patent rights of the other companies to the agreement.<sup>36</sup>

Because cross-license agreements alleviate the concern of patent litigation, many companies are taking advantage of the opportunity they present to direct resources toward research and development rather than litigation of patent rights.<sup>37</sup> Patent cross-licensing agreements are regularly used in many technology fields including computers,<sup>38</sup>

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32. In the analogous property context, *B* would have to trespass on *C*'s property to reach *B*'s own property.

33. John A. Copeland, *Patents Can Play A Vital Role In Supporting High-Tech Firms*, ATLANTA J. AND CONST., Oct. 31, 1993, at 3 ("Any company that uses technology developed in the last 20 years has got to pay careful attention to intellectual property.").

34. Daniel F. Perez, *Exploitation and Enforcement of Intellectual Property Rights*, THE COMPUTER LAWYER, Aug. 1993, at 10 ("In recent years, the assessment, procurement, and protection of intellectual property rights have become a priority for management willing to confront the realities of competition.").

35. *See supra* note 22 and accompanying text.

36. Richard Raysman & Peter Brown, *Strategic Alliances*, N.Y.L.J., June 8, 1993, at 3 ("Perhaps the most efficient method of preventing disputes regarding the ownership and exploitation of intellectual property assets is for the parties to cross-license their technology.").

37. *See* Gregory Quick, *Hard-Drive Companies Cross-License To Avoid Crossing Paths In Court*, COMPUTER RESELLER NEWS, Aug. 30, 1993, at 151 ("As the disk-drive arena remains highly competitive, cross licensing will reduce the chances of patent claims and litigation, while providing a strong foundation for design freedom within the industry.").

38. *See* *Business News—Business Bits*, DEFENSE ELECTRONICS, Nov. 1993, at 16 ("SI Diamond Technology Inc. and Microelectronics and Computer Technology Corp. have agreed to cross license technologies to form flat panel displays."); *But Suit Against Conner Shows It's Litigious As Ever.* . . . ,

biotechnology,<sup>39</sup> telecommunications,<sup>40</sup> medicine<sup>41</sup> and voice processing.<sup>42</sup> Society and the courts should encourage the use of cross-license agreements because they promote "science and the useful arts" rather than litigation of patent rights.<sup>43</sup>

### *E. The Patent Exhaustion Doctrine*

Three limitations are recognized on the patent owner's ability to exclude others from making, using or selling his patented invention: (1) experimental or other nonprofit use by an accused infringer, (2) repair but not reconstruction of the patented invention by an accused infringer, and (3) the patent exhaustion doctrine, which relates to use or resale by an accused infringer after an authorized first sale.<sup>44</sup> This Note explores the third type of limitation.

Under the patent exhaustion doctrine, an authorized sale of a patented product places that patented product beyond the reach of the patent.<sup>45</sup> The patent owner's rights with respect to the product end with the sale, and a purchaser of such a product may use or resell the product free of the patent.<sup>46</sup>

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COMPUTERGRAM INT'L, Aug. 13, 1993 (IBM brought suit against Conner Peripherals Inc. for infringing nine IBM patents. "[P]rior to the filing, the two had made extensive efforts to reach a patent cross-license agreement covering their entire disk drive patent portfolios but couldn't reach agreement."); *IDT Reports Record Revenues and Record Bookings for the Third Quarter of Fiscal 1993*, BUS. WIRE, Jan. 21, 1993 (Integrated Device Technology Inc. and Texas Instruments reached an agreement to "dismiss the patent litigation and . . . entered into a patent cross-license agreement and technology partnership."); *Sanyo, TI Ink Patent License Agreement*, ELECTRONIC NEWS, Nov. 30, 1992 at 20; *Seagate, Quantum Ink Cross-License*, ELECTRONIC NEWS, July 20, 1992 at 25 ("Saying it would rather cooperate with a competitor than pay a lawyer, Seagate Technology last week entered a cross-licensing agreement with Quantum giving the companies rights to use each other's patented technologies . . . . Every day in the newspaper you see another patent litigation has begun, and what's happening is it's the lawyers who are getting paid . . . .").

39. See *Chiron and Ortho Diagnostics Systems Sign HIV and HCV Agreements with Pasteur Sanofi Diagnostics and Genetic Systems*, BUS. WIRE, Nov. 8, 1993 ("This agreement establishes a strong proprietary position for the three businesses in the HIV Immunodiagnostics field."); *Mycogen and Ciba Seeds Sign Licensing Agreement*, BIOTECH BUS., Sept., 1993; *Ventritex Announces Cross-license Agreements*, BUS. WIRE, July 27, 1993 ("These two important cross-license agreements eliminate certain threatened and pending patent litigation as well as provide us with expanded design freedom for future products."); *Grace and Du Pont Cross-license Genetic Engineering Technologies*, INDUS. BIOPROCESSING TECH., May, 1992 at 3.

40. See *Ericsson and Motorola Conclude Compatibility Testing of Telecommunications Equipment*, BUS. WIRE, July 28, 1993.

41. See *Schering Berline Announces Cross-license Agreement With Mallinckrodt Medical for MRI Patents*, BUS. WIRE, Nov. 19, 1993.

42. See *Boston Technology Announces Licensing Agreement with Theis Research, Inc.*, PR NEWSWIRE, Jan. 4, 1993.

43. See *supra* note 8 and accompanying text.

44. 4 DONALD S. CHISUM, A TREATISE ON THE LAW OF PATENTABILITY, VALIDITY AND INFRINGEMENT §16.03 (1993).

45. *Hobie v. Jenson*, 149 U.S. 355 (1893); *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1873); *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1852).

46. *United States v. Univis Lens Co.*, 316 U.S. 241, 250-52 (1942).

In 1873, the Supreme Court stated in *Adams v. Burke*:<sup>47</sup>

[W]hen the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.<sup>48</sup>

In *Keeler v. Standard Folding-Bed Co.*,<sup>49</sup> the Supreme Court expanded the *Adams* doctrine by holding that the purchaser of the patented product could resell as well as use the product free of the patent monopoly.

The authorized first sale of a patented product creates an implied license between the patent owner and buyer. Just as a license is an affirmative defense to a claim of infringement, the patent exhaustion doctrine is a defense to a claim of patent infringement in that implied license rights arise by operation of law.<sup>50</sup> For example, *A* buys a patented watch in an authorized first sale. If *A* uses the watch, the patent owner cannot sue *A* for patent infringement because of the implied license granted to *A* through the patent exhaustion doctrine. If *A* later sells the watch, causing the patent owner to accuse *A* of patent infringement, then *A* may once again use the patent exhaustion doctrine because there was an authorized "first sale" from the patent owner to *A*.

In 1942, the Supreme Court in *United States v. Univis Lens Co.*,<sup>51</sup> applied the patent exhaustion doctrine to parties acting under license agreements. In that case, Univis Corporation licensed Univis Lens Company to manufacture lens blanks and to sell the lens blanks to designated wholesaler licensees of Univis Corporation upon payment of fifty cents per pair of lens blanks by the Lens Company to Univis Corporation. Univis Corporation licensed wholesalers to authorize their purchase of the lens blanks from the Lens Company, to finish the lens blanks by grinding and polishing, and to sell them to prescription retailer licensees only at prices fixed by Univis Corporation. Univis Corporation also licensed the retailer licensees to purchase the blanks and sell them to their customers at prices prescribed by Univis Corporation. All the licenses to the wholesalers and retailers recited Univis Corporation's ownership of the lens patent and conferred to the licensees only the rights stated. The only consideration received by Univis Corporation through the whole licensing process was the fifty cents per pair of lens blanks received from the Lens Company.<sup>52</sup>

The Court stated that "[t]he first vending of any article manufactured under a patent puts the article beyond the reach of the monopoly which the patent confers."<sup>53</sup> The patent

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47. 84 U.S. (17 Wall.) 453.

48. *Id.* at 456.

49. 157 U.S. 659 (1895).

50. HARMON, *supra* note 26, at 173.

51. 316 U.S. 241 (1942).

52. *Id.* at 243-45.

53. *Id.* at 252.

exhaustion doctrine applies both when the article is sold in its completed form and when it is sold in an uncompleted form enabling the buyer to finish the product.<sup>54</sup> Thus, regardless of whether the article is sold in either its finished or unfinished form the patent owner has “parted with his right to assert the patent monopoly with respect to it and is no longer free to control the price at which it may be sold.”<sup>55</sup> The *Univis* Court also stated that “the purpose of the patent law is fulfilled with respect to any particular article when the patentee has received his reward for the use of his invention by the sale of the article, and that once that purpose is realized the patent law affords no basis for restraining the use and enjoyment of the thing sold.”<sup>56</sup>

In the 1980s, the Federal Circuit Court of Appeals heard two cases applying the patent exhaustion doctrine to license agreements. The first was *Lisle Corp. v. Edwards*<sup>57</sup> in which Edwards licensed Lisle to manufacture tools covered by his patents. The license agreement prohibited Lisle from sublicensing the tool patents.

Lisle manufactured the patented tools for Snap-On Corporation and marked the tools with Snap-On’s trademark but not the patent notice that was required under the licensing agreement.<sup>58</sup> Edwards sued both Lisle and Snap-On for patent infringement on the basis that Lisle’s manufacture of the tool with Snap-On’s labeling constituted a manufacturing sublicense through which Lisle made Snap-On a de facto manufacturer. Edwards claimed that this activity constituted sublicensing which was prohibited under the licensing agreement. He argued that the tools manufactured for Snap-On violated the license agreement and, therefore, infringed his patents.<sup>59</sup> However, the Federal Circuit held that the nonexclusive license agreement authorized the sale of tools by Lisle and that resale did not create a sublicense.<sup>60</sup> Therefore, the sale of the tools by Lisle to Snap-On was an authorized first sale, which is a defense to the charge of patent infringement by Edwards.

The second case was *Unidisco, Inc. v. Schattner*,<sup>61</sup> in which Schattner granted Girard an exclusive license to use its “001 patent.” The license agreement provided that Girard could not sublicense the “001 patent” without written approval by Schattner. Girard entered into an exclusive distributorship with Unidisco. Schattner claimed that the Girard-Unidisco exclusive distributorship agreement was an illegal sublicense, and, therefore, the products sold to Unidisco infringed his patent.<sup>62</sup>

The *Unidisco* court held that “[r]esale of the product by Unidisco could not infringe the patent if Unidisco purchased the product from an authorized seller.”<sup>63</sup> Girard’s sale of the product to an exclusive distributor was an authorized sale because the Girard-Unidisco relationship did not create a sublicense, and the sale did not violate the terms of

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54. *Id.*

55. *Id.* at 251.

56. *Id.*

57. 777 F.2d 693 (Fed. Cir. 1985).

58. See 35 U.S.C. § 287 (1988).

59. See *supra* note 28 and accompanying text.

60. *Lisle*, 777 F.2d at 695 (The holding of the Federal Circuit Court of Appeals was conclusory and did not establish any rationale for its decision.).

61. 824 F.2d 965 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

62. See *supra* note 28 and accompanying text.

63. 824 F.2d at 968.

the license agreement because the license agreement allowed Girard to sell the products.<sup>64</sup> Once again, the sale of the products by Girard to Unidisco was an authorized first sale, which is a defense to the charge of patent infringement by Schattner.

## II. THE PATENT EXHAUSTION DOCTRINE APPLIED TO FOUNDRY AGREEMENTS

Companies with insufficient manufacturing capacity often contract with entities that have excess manufacturing capacity to manufacture their products. These contracts are called foundry agreements.<sup>65</sup> Foundry agreements are useful for small companies that design products but have little, if any, manufacturing capability.

Under a typical foundry agreement, the design firm submits the design of the product to the foundry, which manufactures the product and offers minimal design modifications for manufacturing purposes only. The design firm generally retains all intellectual property rights to the product. Therefore, the foundry has no right to exclude others from making, using or selling the invention nor to make or sell the invention itself. Foundry agreements provide the socially desirable function of allowing a small entity to design and produce a product with minimal capital outlay.

Two recent cases in the Federal Circuit Court of Appeals have addressed the situation where an unlicensed design firm contracted with a foundry, licensed by a patent holder, to make a product which infringed the patent holder's patent.<sup>66</sup> The unlicensed design firm claimed that the patent exhaustion doctrine precluded the patent holder from asserting patent infringement claims because an authorized first sale occurred between the licensed foundry and the unlicensed design firm. More specifically, the unlicensed design firm claimed that the licensed foundry manufactured a product that it was permitted to manufacture under the licensing agreement with the patent holder and then sold the authorized product to the unlicensed design firm.

This argument was successful. However, the result of permitting an unlicensed design firm to have its infringing product manufactured without the consent of the patent owner undermines the policy underlying the patent system. In effect, the unlicensed design firm is using the patent exhaustion doctrine to legalize an activity that should be deemed patent infringement.

### *A. The Atmel Case*

In *Intel Corp. v. United States Int'l Trade Comm'n ("Atmel")*,<sup>67</sup> Intel and Sanyo entered into a patent cross-licensing agreement. The agreement granted Sanyo the right

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64. *Id.*

65. See *Cyrix Corp. v. Intel Corp.*, 803 F. Supp. 1200, 1204 (E.D. Tex. 1992), *appeal dismissed*, 9 F.3d 978 (Fed. Cir. 1993) ("[F]oundry' work . . . refers to arrangements in which a semiconductor company makes and sells to its customers integrated circuit products, the designs for which were developed or owned by the customers.").

66. *Intel Corp. v. United States Int'l Trade Comm'n*, 946 F.2d 821 (Fed. Cir. 1991) [hereinafter *Atmel*]; *Intel Corp. v. ULSI Systems Technology, Inc.* 995 F.2d 1566 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 923 (1994) [hereinafter *ULSI*].

67. 946 F.2d 821.

to make, use or sell “any Sanyo . . . products” under Intel’s patents.<sup>68</sup> Sanyo entered into foundry agreements with Atmel Corporation and General Instrument Corporation and Microchip Technology Incorporated (GI/M) under which Sanyo manufactured Erasable Programmable Read-Only Memories (EPROMs) for Atmel and GI/M. The EPROMs, designed by Atmel and GI/M, infringed several Intel patents. Intel filed a complaint with the United States International Trade Commission (“Commission”) to prevent Atmel and GI/M from importing the infringing EPROMs into the United States. The Commission assigned the investigation of Intel’s complaint to an administrative law judge (ALJ). Based upon the ALJ’s findings, the Commission concluded that the EPROMs imported by Atmel and GI/M infringed the Intel patents and ordered Atmel Corp. and GI/M to cease and desist from importing EPROMs.<sup>69</sup> Atmel argued that “its EPROMs did not infringe any of the Intel patents because the EPROMs were made by Sanyo under Sanyo’s cross-licensing agreement with Intel” and, therefore, the patent exhaustion doctrine provided a defense to Intel’s claim of patent infringement.<sup>70</sup>

The ALJ addressed the question of the Intel/Sanyo cross-licensing agreement by reasoning:

The interpretation of the licensing agreement as proposed by Atmel would mean that any company that was unable to obtain a license from Intel but still wanted to make its own parts practicing Intel patents could employ Sanyo as a foundry and circumvent Intel’s patents. Without something to explain why the parties would have intended such a result, the agreement will not be given this strained construction.<sup>71</sup>

The International Trade Commission adopted the ALJ’s decision on this issue.<sup>72</sup>

On appeal, the Federal Circuit Court of Appeals addressed the patent exhaustion doctrine as applied to the foundry agreement by stating:

If the Intel/Sanyo agreement permits Sanyo to act as a foundry for another company for products covered by the Intel patents, the purchaser of those

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68. *Id.* at 826. The language of the cross-license “any Sanyo . . . products” will hereinafter be referred to as the Sanyo limitation. More specifically the cross-licensing agreement between Intel and Sanyo provides that:

Intel hereby grants and will grant to Sanyo an [sic] non-exclusive, world-wide royalty-free license without the right to sublicense except to its Subsidiaries, under Intel Patents which read on any Sanyo semiconductor material. . . . Sanyo hereby grants and will grant to Intel a non-exclusive world-wide, royalty-free, license without the right to sublicense except to its Subsidiaries, under Sanyo Patents which read on any Intel Semiconductor Device . . . for the lives of such patents to make, use and sell such products.

*Id.* at 826 n.9.

69. *Id.* at 825.

70. *Id.* at 826.

71. *Id.* at 827.

72. *Id.*

licensed products from Sanyo would be free to use and/or resell the products. Such further use and sale is beyond the reach of the patent statutes.<sup>73</sup>

The *Atmel* court then considered the ALJ's arguments and found that "Atmel has not established its license defense to infringement, and that the ALJ's reasoning is persuasive."<sup>74</sup> The *Atmel* court adopted a broad rule that in the absence of any evidence of contrary intent, the Intel-Sanyo cross-license agreement would not be construed to allow Sanyo to operate as a foundry for third parties to circumvent Intel's patent rights.<sup>75</sup>

After adopting this broad rule, the *Atmel* court analyzed the Intel-Sanyo cross-license agreement and specifically addressed the limitation in the agreement that Sanyo could only make, use and sell Sanyo products.<sup>76</sup> The *Atmel* court stated that "the words 'Sanyo . . . products' . . . are properly construed to cover only Sanyo designed and manufactured products and to exclude parts designed by others."<sup>77</sup>

### B. *The Intel v. ULSI Case*

In June, 1993, the Federal Circuit Court of Appeals allowed an unlicensed design firm to use the patent exhaustion doctrine as a defense to sanitize an infringing product through a licensed foundry.<sup>78</sup> This case overruled a federal district court decision which held that: (1) the defendant's (ULSI) product infringed every element of three claims of the patent owner's (Intel) patent, (2) the infringed patent was valid and (3) the cross-license agreement between the patent owner and the foundry (Hewlett-Packard) did not provide a defense.<sup>79</sup>

On January 10, 1983, Intel and Hewlett-Packard (HP) entered into a cross-license agreement.<sup>80</sup> On August 2, 1988, ULSI and HP entered into a foundry agreement for the manufacture of coprocessor chips. Under the foundry agreement, ULSI supplied HP with proprietary design specifications and HP manufactured and shipped the completed coprocessor chips to ULSI. ULSI then sold the chips as ULSI products. ULSI owned the rights to its coprocessor chips and HP had no rights to the chips. On February 4, 1991,

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73. *Id.* at 826 (citing *United States v. Univis Lens Co.*, 316 U.S. 241, 250-52 (1942)).

74. *Id.* at 828.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Intel Corp. v. ULSI Sys. Technology, Inc.*, 995 F.2d 1566 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 923 (1994).

79. *Intel Corp. v. ULSI Sys. Technology, Inc.*, 782 F. Supp. 1467 (D. Or. 1991), *rev'd*, 995 F.2d 1566, *cert. denied*, 114 S. Ct. 923 (1994).

80. *Id.* at 1473-74. The cross-license agreement provides, in part:

1. [Hewlett-Packard] hereby grants Intel an irrevocable, retroactive, nonexclusive, world-wide, royalty-free license under all patents and patent applications owned and controlled by [Hewlett-Packard] having a first effective filing date prior to January 1, 2000, said license to be effective until the expiration of said patents.
2. Intel hereby grants [Hewlett-Packard] an irrevocable, retroactive, nonexclusive, world-wide, royalty-free license under all patents and patent applications owned and controlled by Intel having a first effective filing date prior to January 1, 2000, said license to be effective until the expiration of said patents.

Intel became aware of the ULSI chips and discovered that the chips infringed at least one of their patents. On July 29, 1991, Intel brought a patent infringement action against ULSI.<sup>81</sup>

Like Atmel Corp. in the *Atmel* case, ULSI argued that the patent exhaustion doctrine was a defense to infringement.<sup>82</sup> Specifically, ULSI argued that the “sale of the coprocessors by HP to ULSI was a ‘first sale’ that extinguished Intel’s patent rights with respect to those products.”<sup>83</sup>

The district court relied on the testimony of witnesses to find that “neither Intel nor Hewlett-Packard intended their agreement to be so broad as to grant the other party the power to sublicense any patent granted under the Intel/Hewlett-Packard agreement.”<sup>84</sup> The court continued, “[s]ince both Intel and Hewlett-Packard have attached the same meaning to their contract, the court will interpret the Intel/Hewlett-Packard agreement in accordance with that meaning.”<sup>85</sup> The district court also stated that Intel’s patent rights could not be extinguished under the patent exhaustion doctrine because a sale of coprocessor chips did not occur between HP and ULSI.<sup>86</sup> The court found that no sale took place because HP never “assumed any ownership rights in any ULSI product and had no right to use or sell any ULSI product.”<sup>87</sup>

The Federal Circuit Court of Appeals reversed the district court in a 2-1 decision, finding that a sale of coprocessor chips did occur between HP and ULSI and that ULSI was, therefore, allowed to use the patent exhaustion doctrine as a defense to infringement.<sup>88</sup> Circuit Judge Plager began his dissenting opinion by stating, “ULSI has managed to take a shield the law provides to purchasers of products containing patented inventions and turn it into a sword to cut off the legitimate rights of the patent owner.”<sup>89</sup>

1. *ULSI Majority Opinion*.—The majority opinion, written by Circuit Judge Lourie, initially suggested that the “longstanding principle” of the patent exhaustion doctrine “applies similarly to a sale of a patented product manufactured by a licensee acting within the scope of its license” as it does to the sale of a patented product by the patent owner.<sup>90</sup> The majority then considered whether there was a sale of patented coprocessors by HP to ULSI or whether HP merely sold its manufacturing services to ULSI.<sup>91</sup>

The majority’s review of the HP-ULSI foundry agreement led it to conclude that the agreement in fact involved the sale of coprocessors, not the sale of services.<sup>92</sup> According

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81. *ULSI*, 995 F.2d at 1567.

82. *See supra* text accompanying note 70.

83. *ULSI*, 995 F.2d at 1568.

84. *ULSI*, 782 F. Supp. at 1474-75.

85. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 201(a) (1979)); HARMON, *supra* note 26, at 214.

86. *ULSI*, 782 F. Supp at 1475 n.7.

87. *Id.*

88. *ULSI*, 995 F.2d at 1570.

89. *Id.* at 1571 (Plager, J., dissenting).

90. *Id.* at 1569.

91. *Id.* at 1568-69.

92. *Id.* at 1569.

to the majority, the agreement referred many times to the sale of chips, and, moreover, the agreement included a delivery schedule for shipment of the chips.<sup>93</sup>

The majority stated that the licensed seller of a patented product need not own the intellectual property rights to the product for a sale to occur.<sup>94</sup> “Who designed the chip and whether it embodies inventions other than Intel’s have no bearing on the controlling issue whether the ’C87 coprocessors were sold by HP to ULSI and thus extinguished Intel’s patent rights relating to those products.”<sup>95</sup> The Intel-HP cross-licensing agreement authorized HP to make and sell the ULSI chips, depriving Intel of any claim of infringement.<sup>96</sup> Had Intel limited the cross-licensing agreement in “some relevant way,” then the result might have been different and “Intel might thereby have retained its right to proceed against those who entered into foundry agreements such as the present one.”<sup>97</sup>

The majority noted that in 1983, when HP and Intel entered into the cross-licensing agreement, Intel received consideration for the agreement that it believed was adequate. Therefore, it could not “renege on that grant to avoid its consequences.”<sup>98</sup> The court also rejected Intel’s argument that the sale of chips by HP to ULSI constituted a “de facto sublicense,”<sup>99</sup> stating that it had found a similar argument in *Lisle* to be “without merit and specious.”<sup>100</sup> In this case, the foundry agreement between HP and ULSI was not a sublicense because “HP did not empower ULSI to make Intel-patented chips or to use or sell any such chips except those lawfully sold to it by HP.”<sup>101</sup>

In addition, the majority stated that Intel’s contention that HP was not authorized to sublicense was irrelevant because the HP-ULSI agreement was a contract for the manufacture and sale of chips and not a sublicense.<sup>102</sup> Therefore, “ULSI is immune from infringement, not because it was a sublicensee, which it was not, but because HP was a licensed and therefore legitimate source of the chips. Moreover, ULSI was not required to be sublicensed in order to provide its chip design to HP.”<sup>103</sup>

Finally, the majority addressed the *Atmel* decision,<sup>104</sup> focusing on the *Atmel* court’s recognition of the Sanyo limitation in the Intel-Sanyo cross-license agreement.<sup>105</sup> No similar limitation existed in the Intel-HP cross-license agreement restricting “HP’s right to sell or serve as a foundry” and make infringing products for an unlicensed third party such as ULSI.<sup>106</sup> Therefore, the court found that because no provision in the Intel-Sanyo

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; *see supra* note 60 and accompanying text.

101. *ULSI*, 995 F.2d at 1570.

102. *Id.*

103. *Id.*

104. *See supra* note 67 and accompanying text.

105. *ULSI*, 995 F.2d at 1570; *see supra* note 76 and accompanying text.

106. *ULSI*, 995 F.2d at 1570.

cross-license agreement prevented HP from acting as a foundry, HP was permitted to act as a foundry.<sup>107</sup>

2. *ULSI Dissenting Opinion.*—Judge Plager asserted that the patent exhaustion doctrine did not apply to the situation presented in this case for two reasons.<sup>108</sup> First, the first sale of the chips was from ULSI to its customers and not from HP to ULSI.<sup>109</sup> The relationship between HP and ULSI involved a sale of services and not a sale of coprocessor chips. Second, HP's activity was not within the scope of the Intel-HP cross-license agreement.<sup>110</sup>

With respect to the first point, Judge Plager set forth two facts that demonstrated that the relationship between HP and ULSI resulted in the sale of services by HP and not the sale of chips: (1) HP did not sell ULSI a product incorporating Intel's patented invention but rather sold ULSI raw materials and manufacturing expertise,<sup>111</sup> and (2) HP could not have manufactured excess chips of ULSI's design and sold them to third parties because HP did not own the intellectual property rights in the chips.<sup>112</sup> The crucial question in determining whether the relationship produced the sale of services or the sale of a product is "whose design and whose property was involved."<sup>113</sup>

On the second point, Judge Plager considered whether Intel authorized HP's sale to ULSI.<sup>114</sup> He noted that the language of the Intel-HP cross-license expressed an intent to increase the freedom of design for both parties.<sup>115</sup> Judge Plager also noted that both parties agreed that there was "no intent to immunize third party infringers," or, more specifically, there was no intent to grant a sublicense under any Intel patents licensed to HP.<sup>116</sup> In this respect, Judge Plager agreed with the district court finding that neither Intel nor HP intended their cross-license agreement to allow the other party to sublicense any patent granted under the cross-license.<sup>117</sup>

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107. *Id.* (Plager, J., dissenting).

108. *Id.* at 1572 (Plager, J., dissenting).

109. *Id.*

110. *Id.*

111. *Id.* The product was ULSI's, never HP's, and assuredly not Intel's. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1572-73. (citing *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 182 (1938) and *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 703 (Fed. Cir. 1992)). In *General Talking Pictures*, a licensee had a nonexclusive license to sell a patented product only to a selected market. The licensee knowingly sold and the purchaser knowingly bought the product outside the confines of the license. The Court found that both parties infringed the patent embodied in the product. *General Talking Pictures*, 304 U.S. at 181-82. For a discussion of *Mallinckrodt*, see text accompanying *infra* notes 165-74.

115. *ULSI*, 995 F.2d at 1573 (Plager, J., dissenting).

116. *Id.* at 1573-74 ("[T]he Associate General Counsel and Director of Intellectual Property for HP testified that '[n]either Intel nor HP intended to grant the other the right to sublicense any patents licensed to the other under the patent cross-license agreement.' Further, he testified that 'HP did not intend to grant a sublicense under any Intel patents licensed to HP.'").

117. *Id.* at 1573; see *supra* note 84 and accompanying text.

According to Judge Plager:

The use of the term “sublicense” by counsel and court must be understood to mean that the cross-license did not give HP the power to authorize third parties to separately design and manufacture (or have manufactured) products incorporating the patented invention. Thus HP could itself manufacture and sell products with the patented invention incorporated in them (and purchasers of these products from HP would be protected in their use under the ‘first sale’ principle), but HP was not licensed to authorize others to do so.<sup>118</sup>

Next, the dissent considered the majority’s interpretation of the *Lisle* decision.<sup>119</sup> According to Judge Plager,

*Lisle* does not stand for a general rule that an argument that sublicensing is prohibited under a particular license is necessarily “specious.” The substance of the transaction at issue should control whether it is “sublicensing,” and the terms of the license as intended by the parties should determine whether such “sublicensing” is permitted.<sup>120</sup> Judge Plager concluded that the substance of the HP-ULSI transaction was sublicensing and that the Intel-HP cross-license did not permit such sublicensing.<sup>121</sup>

Judge Plager found that *Atmel* presented a similar question to that posed by *ULSI*.<sup>122</sup> He discussed the general rule enunciated in *Atmel* and agreed that “[w]ithout something to explain why the parties would have intended such a result [allowing an unlicensed third party to sanitize infringing products through a licensed foundry], the agreement will not be given this strained construction.”<sup>123</sup>

As to whether a sale of the accused product actually occurred, Judge Plager observed that ULSI indemnified HP against any claims of patent infringement which might arise from the ULSI design, even though ULSI assured HP that it knew of no intellectual property concerns about the design.<sup>124</sup> Judge Plager concluded that if HP had intended to sell ULSI a chip that embodied Intel’s patent then this indemnification clause would not have been necessary.<sup>125</sup>

The opinion reiterates the fact that HP did not own the ULSI invention. Because HP never had ownership rights in the invention, something other than the accused product must have been sold to ULSI.<sup>126</sup> “[T]he overall context of the contract demonstrates that

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118. *ULSI*, 995 F.2d at 1573 (Plager, J., dissenting).

119. *See supra* note 100 and accompanying text.

120. *ULSI*, 995 F.2d at 1574 (Plager, J., dissenting).

121. *Id.* Judge Plager noted that in *Lisle* the licensee manufactured and sold products of the patented licensed invention to a third party. However, in *ULSI* the licensee (HP) manufactured the third party’s invention. *Id.*

122. *Id.*; *see supra* note 67 and accompanying text.

123. *ULSI*, 995 F.2d at 1575 (Plager, J., dissenting); *see supra* note 71 and accompanying text.

124. *ULSI*, 995 F.2d at 1575 (Plager, J., dissenting) (citing Affidavit of Richard R. Duncombe, HP Sales Manager, Jt. App. at 411).

125. *Id.*

126. *Id.*

the sale was of services, measured per chip, rather than sale of any technology (be it Intel's or ULSI's), as embodied in each chip.”<sup>127</sup> Judge Plager concluded that because the first sale of the coprocessor chips was by ULSI, and not HP, that sale is not protected by the patent exhaustion doctrine.<sup>128</sup>

3. *Analysis.*—The *ULSI* decision created an inequitable result that will have negative implications on the way parties view patent procurement and patent licensing agreements. Judge Plager expressed this thought eloquently: “ULSI has managed to take a shield the law provides to purchasers of products containing patented inventions and turn it into a sword to cut off the legitimate rights of the patent owner.”<sup>129</sup>

The *ULSI* court could have used several legitimate grounds to find that the patent exhaustion doctrine did not apply to the ULSI coprocessors: 1) *Atmel* established a rebuttable presumption that cross-license agreements do not permit unlicensed third parties to sanitize their products through licensed foundries;<sup>130</sup> 2) The relationship between HP and ULSI resulted in the sale of services rather than the sale of a product; and 3) The relationship between HP and ULSI created a sublicense.

a. *The consideration argument.*—Intel received consideration for its patents under the cross-license agreement with HP.<sup>131</sup> Intel apparently believed that this consideration was adequate at the time it entered into the agreement and was not permitted to avoid the consequences of its decision.<sup>132</sup> Thus, to allow an unlicensed third party (ULSI) to use a licensed foundry (HP) to sanitize an infringing product may be reasonable because to allow the patent holder (Intel) to sue the unlicensed design firm for patent infringement would allow the patent owner/licensor to receive “double consideration.” However, this argument would be sound only if the cross-license agreement expressly authorized the licensees to act as foundries in this situation.

The patent cross-license agreement in *ULSI*, and these agreements in general, are not exclusive. Therefore, Intel and HP have received consideration for the use of their patent portfolio from other companies that they had licensed. It is inequitable to allow any unlicensed party to sanitize its infringing products through another party licensed by the patent holder because the patent holder and licensees have paid<sup>133</sup> for the use of the patent and the unlicensed third party has not paid.

Only if the parties to the original cross-license agreement expressly agree to permit foundry agreements should the consideration to the cross-license agreement be deemed sufficient to preclude the patent holder from claiming patent infringement. Moreover, courts should require express language in the cross-license agreement specifying that foundry agreements are permitted. The *ULSI* majority concluded that the parties to the

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127. *Id.* at 1575-76.

128. *Id.* at 1576.

129. *Id.* at 1571.

130. *See supra* text accompanying note 75.

131. *See supra* note 109 and accompanying text.

132. *See supra* note 109 and accompanying text.

133. The patent holder has paid through research and development costs and the licensees have paid consideration for the license.

HP-Intel cross-license agreement agreed to allow foundry agreements despite the absence of express language.<sup>134</sup>

Although the majority in *ULSI* analogized to *Univis* on the consideration issue, *Univis* is distinguishable.<sup>135</sup> In *Univis*, the patent exhaustion doctrine was invoked because the patent holder was trying to impose conditions on future transferees of the product.<sup>136</sup> In *ULSI*, the patent holder was not trying to impose conditions on future transferees but rather was trying to prevent unlicensed third parties from sanitizing their products through a licensed foundry. In *Univis*, the patent holder obviously had received adequate consideration for his product. The situation in *Univis* would be analogous to the situation in *ULSI* only if an unlicensed third party used one of Univis Corporation's licensees to sanitize infringing products.

b. *Interpretation of the Atmel decision.*—The majority and dissent in *ULSI* interpreted the *Atmel* decision differently. Judge Plager's dissent followed the general rule<sup>137</sup> announced in *Atmel* that a cross-license agreement must expressly allow foundry agreements before the patent exhaustion doctrine can be used as a defense to patent infringement by an unlicensed third party. The majority restricted its interpretation of *Atmel* to the narrow holding that the patent exhaustion doctrine applies unless the cross-license agreement includes a restriction similar to the Sanyo limitation (Sanyo may only make, use or sell Sanyo products) found in *Atmel*.<sup>138</sup>

In the *Atmel* decision, the court approved of the ALJ's finding and established a general rule that “[w]ithout something to explain why the parties would have intended such a result, the agreement will not be given this strained construction.”<sup>139</sup> The *Atmel* court rejected a “strained construction” of the Sanyo-Intel cross-licensing agreement, which would have allowed foundry agreements. Yet the *ULSI* majority adopted this very construction of the Intel-HP cross-licensing agreement.

In light of the evidence produced regarding the parties' intentions under the cross-license agreement, why did the majority in *ULSI* give the Intel-HP cross-license such a “strained construction” by allowing the patent exhaustion doctrine to be used as a defense to patent infringement by an unlicensed party in a foundry agreement? A thorough reading of the *Atmel* decision clearly shows that the court adopted the general rule but then applied it to the specific fact situation presented in *Atmel*.<sup>140</sup> After setting forth this general rule, the *Atmel* court focused on the language of the Sanyo-Intel cross-license agreement, which provided that only Sanyo products were covered by the license.<sup>141</sup> The *Atmel* court did not look at the language of the agreement as proof that the parties did not want a “strained construction” of the cross-license agreement. This language merely reinforced the conclusion that the court had already reached.

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134. See *supra* note 107 and accompanying text.

135. See *supra* note 51 and accompanying text.

136. See *supra* note 56 and accompanying text.

137. See *supra* text accompanying note 123.

138. See *supra* text accompanying note 107.

139. *Atmel*, 946 F.2d 821, 827 (Fed. Cir. 1991).

140. *Id.* at 826-28.

141. *Id.*

*Atmel* should be interpreted as requiring the party that favors permitting foundry agreements under a cross-license agreement to show that the parties to the cross-licensing agreement intended this result. Therefore, in *ULSI*, ULSI should have had the burden of proving that HP and Intel intended to allow an unlicensed third party such as ULSI to sanitize its infringing products through HP. Neither the language of the cross-license agreement, nor the testimony by the witnesses, leads to a finding that HP and Intel intended such a result.<sup>142</sup>

c. *Sale of services v. sale of a product.*—The *ULSI* majority concluded that the issue of whether the unlicensed third party (ULSI) designed the accused product was irrelevant, as was the issue of whether the licensed foundry (HP) owned intellectual property rights in the accused product.<sup>143</sup> Judge Plager disagreed, saying that these are the determining issues.<sup>144</sup> Judge Plager questioned what the licensed foundry is selling if it does not own the intellectual property rights in the product.<sup>145</sup>

A licensed foundry does not own intellectual property rights to the invention. By definition, an assignment transfers an interest in the patent itself; a license transfers an interest that is less than the patent itself.<sup>146</sup> In this respect, the majority's argument that ownership of the intellectual property rights is irrelevant is correct because a licensed foundry does not own an interest in the patent holder's patent.

A licensed foundry is never given an affirmative right to make, use and sell the product; it only has a promise from the licensor that it will not be sued for patent infringement.<sup>147</sup> However, even the patent holder does not have an affirmative right to make, use or sell. The patent owner only has the negative right to exclude others from making, using or selling the patented invention. The licensee is allowed to make, use or sell the patent holder's patented invention to the same extent as the patent holder.<sup>148</sup> In this respect, Judge Plager's emphasis on who owns the intellectual property rights to the invention is correct.

In *ULSI*, HP purchased the raw product and transformed it into a coprocessor according to ULSI's design. From the testimony, HP obviously did not even have a license to make, use or sell the ULSI-designed chips because it could not have sold the chips to anyone other than ULSI.<sup>149</sup> HP owned only the personal property rights to each chip, and even that was limited. Therefore, the majority allowed the "sale" from HP to ULSI to exhaust Intel's patent rights when HP did not even have a license to make, use or sell the product it was selling.

The *ULSI* majority found that the language in the Intel-HP cross-license agreement referring to the sale of chips and including a delivery schedule for their shipment demonstrated that the relationship between HP and ULSI resulted in the sale of a product

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142. See *supra* note 116.

143. See *supra* note 94 and accompanying text.

144. See *supra* note 113 and accompanying text.

145. *ULSI*, 995 F.2d. 1566, 1575 (Fed. Cir. 1993) (Plager, J., dissenting), cert. denied, 114 S. Ct. 923 (1994).

146. BLACK'S LAW DICTIONARY 920 (6th ed. 1990).

147. See *supra* note 26 and accompanying text.

148. See *supra* note 15 and accompanying text.

149. See *supra* note 87 and accompanying text.

and not of services.<sup>150</sup> Judge Plager, however, argued that HP provided only the raw material and its manufacturing expertise and that HP did not even own a license to exclude others from making, using or selling the invention.<sup>151</sup>

When analyzed as a whole, the ULSI-HP relationship is clearly a sale between HP and ULSI involving the sale of services, not the sale of a product. Because HP provided only raw materials and manufacturing expertise, and because HP could not sell the ULSI product to anyone other than ULSI,<sup>152</sup> the sale between HP and ULSI had to be of something other than a product.

*d. The sublicense argument.*—Another topic of debate between the majority and dissent was the majority's assertion that similar arguments were presented in *Lisle* and *ULSI*.<sup>153</sup> In *Lisle*, as opposed to *ULSI*, the licensee was acting under a license which permitted it to sell the product to any party. Also in *Lisle*, the licensee was not making an infringing product designed by an unlicensed third party. Therefore, the argument presented in *Lisle* was not similar to the one presented in *ULSI*.

The *ULSI* majority stated that the HP-ULSI relationship did not result in a sublicense because "HP did not empower ULSI to make Intel-patented chips or to use of any such chips except those lawfully sold to it by HP."<sup>154</sup> Judge Plager, however, found that the substance of the transaction between HP and ULSI resulted in a sublicense.<sup>155</sup> He noted that HP was authorized to make and sell products which incorporated the Intel-patented invention.<sup>156</sup> However, Judge Plager found that the HP-ULSI relationship involved ULSI designing an infringing product and HP authorizing ULSI to make and sell the product.<sup>157</sup>

If the relationship between HP and ULSI did create a sublicense, then ULSI could have any foundry manufacture its product. Although the HP-ULSI relationship did not bring about such a result, the argument that the substance of the relationship created a "de facto sublicense" is persuasive.

HP did allow ULSI to make a product that no one other than Intel, HP or another Intel licensee could lawfully have made. This factor by itself does not conclusively establish that the HP-ULSI relationship resulted in a sublicense because if ULSI wanted to purchase any product incorporating an Intel patented invention it would have to purchase it from Intel, HP or another licensee.

However, a second aspect of the foundry agreement between HP and ULSI leads to the conclusion that, in substance, the relationship between HP and ULSI was a sublicense. Specifically, HP could not make and sell the ULSI-designed invention to anyone other than ULSI. HP did not even have the equivalent of a license to practice ULSI's invention. Therefore, HP did authorize ULSI to make and sell an invention in which ULSI owned all the intellectual property rights.

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150. See *supra* note 93 and accompanying text.

151. See *supra* notes 111-12 and accompanying text.

152. HP did not even have a license to the ULSI invention.

153. See *supra* notes 100, 119 and accompanying text.

154. See *supra* note 101.

155. See *supra* note 122.

156. See *supra* note 118 and accompanying text.

157. See *supra* note 118 and accompanying text.

Returning to the example in Figure 1,<sup>158</sup> analogous property *A* is owned by Intel and analogous property *B* is owned by ULSI. The substance of the HP-ULSI relationship resulted in HP allowing ULSI to trespass over Intel's analogous property to reach its property. Thus, the substance of the HP-ULSI relationship resulted in a sublicense.

If ULSI and HP were acting under a joint venture arrangement to produce a product (*i.e.* both contributed to the design and both had an interest in the intellectual property rights in the product), then ULSI and HP, as one party, would fall under the protection of the HP-Intel cross-licensing agreement. Returning to the example presented in Figure 1, the analogous property owned by *A* belongs to Intel and the analogous property owned by *B* now belongs to both HP and ULSI. Now, both HP and ULSI must cross over Intel's property to reach their property. Here, HP and ULSI as a party are authorized under the Intel-HP cross-licensing agreement to trespass on *A*'s property.

The facts of the *ULSI* case show that the substance of the HP-ULSI relationship resulted in a sublicense. The following case, applying the patent exhaustion doctrine to a foundry agreement, presents a different set of facts that provide stronger support for the patent exhaustion doctrine to preclude a patent holder from asserting a patent infringement claim.

### C. The *Cyrix* Case

In *Cyrix Corporation v. Intel Corporation*,<sup>159</sup> Intel and Mostek Corporation entered into a patent cross-license agreement. SGS-Thomson was the corporate successor to the original Mostek Corporation.<sup>160</sup> Cyrix Corporation designed a coprocessor in collaboration with SGS-Thomson. The final design included proprietary information of both Cyrix and SGS-Thomson. Each party had rights to the coprocessor design and under an agreement neither party could provide the design to a third party without the permission of the other. SGS-Thomson manufactured the coprocessors and delivered them to Cyrix. Thus, SGS-Thomson was the licensed foundry just as HP was in *ULSI*, and Cyrix was the unlicensed third party just as ULSI was in *ULSI*. Intel alleged that the coprocessor infringed one of its patents and, therefore, Cyrix was guilty of patent infringement. Cyrix claimed that the patent exhaustion doctrine barred Intel from bringing a patent infringement action against Cyrix.

The facts of *Cyrix* provide stronger support for the application of the patent exhaustion doctrine to prevent Intel from asserting patent infringement than did the facts in *ULSI*. The parties to the original cross-license in *Cyrix* apparently intended to allow foundry agreements, but the converse was true in *ULSI*.<sup>161</sup> Also, in *Cyrix* both the

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158. See *supra* text accompanying notes 23-30.

159. 803 F. Supp. 1200 (E.D. Tex. 1992), *appeal dismissed*, 9 F.3d 978 (Fed. Cir. 1993).

160. Although disputed in the case, it is assumed for the purposes of this Note that SGS-Thomson is licensed by Intel.

161. 803 F. Supp. at 1204-05. Both Intel and Mostek were involved in the foundry business at the time of the agreement and expressed their intention to remain in the foundry business. The goals of Intel and Mostek were to provide "patent peace" between the parties and allow freedom of action for the companies to pursue their business activities. *Id.*

licensed foundry and the third party participated in the design and had an interest in the intellectual property rights of the design. Once again, in *ULSI*, the converse was true.<sup>162</sup>

The district court found for Cyrix on the patent exhaustion doctrine issue.<sup>163</sup> Although the decision may be correct due to the facts of the case, the reasoning behind the decision is similar to that employed by the majority in *ULSI* and if applied to subsequent cases, it will lead to inequitable results such as that reached in *ULSI*.<sup>164</sup>

### III. THE MALLINCKRODT DECISION

*Mallinckrodt, Inc. v. Medipart, Inc.*,<sup>165</sup> also decided by the Federal Circuit Court of Appeals, is another case that addresses the use of the patent exhaustion doctrine. One commentator suggests that this decision "will permit many patentees to limit, through contracts and notice restrictions, the exhaustion or first sale doctrine which has traditionally applied to patented items."<sup>166</sup> As opposed to *ULSI*, the court in *Mallinckrodt* displayed genuine concern for the rights of patent owners.

In *Mallinckrodt*, Mallinckrodt sold a patented device to deliver a "radioactive or therapeutic material in aerosol mist form to the lungs of a patient."<sup>167</sup> The device includes a nebulizer which generates the mist, a manifold which directs the airflow to the patient's mouth, a filter, tubing, mouthpiece and a noseclip. The patented devices display the patent number, trademark brand name and the inscription "Single Use Only." The instructions state that only one patient is to use the device. The device is then to be disposed of properly.<sup>168</sup>

Medipart provided a service to hospitals that wanted to reuse the device. Hospitals shipped the used equipment to Medipart, who employed Radiation Sterilizers, Inc. to expose the devices to radiation. Medipart checked the devices for damage or leaks and provided a new filter, tubing, mouthpiece and nose clip before shipping the "reconditioned" units back to the hospitals.<sup>169</sup>

The Federal Circuit Court of Appeals overruled the district court decision, finding that the restriction on reuse, "Single Use Only," was enforceable under the patent law.<sup>170</sup> The district court had based its holding on the patent exhaustion doctrine because the

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162. *Id.* at 1205-06. Cyrix conducted the initial design work, and Cyrix and SGS-Thomson incorporated the design into SGS-Thomson's trade secret "design rules." SGS-Thomson subsequently added more design input, including the "active" layer of the coprocessor. Every step of the manufacturing process was conducted by SGS-Thomson. *Id.*

163. *Id.* at 1214-15.

164. *Id.*

165. 976 F.2d 700 (Fed. Cir. 1992).

166. James B. Kobak, Jr., *Contracting Around Exhaustion: Some Thoughts About the CAFC's Mallinckrodt Decision*, 75 J. PAT. OFF. SOC'Y 550 (1993).

167. *Mallinckrodt*, 976 F.2d at 701.

168. *Id.* at 702.

169. *Id.*

170. *Id.* at 703.

patent owner's rights are exhausted after the first authorized sale of the patented product.<sup>171</sup>

The court of appeals found that the patent exhaustion doctrine does not stand for the proposition that no restriction or condition may be placed on the sale of a patented article.<sup>172</sup> The court conditioned this holding, stating that the restriction or condition must not violate some other law or policy such as patent misuse or antitrust law.<sup>173</sup> After refuting the district court's argument, the court of appeals stated, "The appropriate criterion is whether Mallinckrodt's restriction is reasonably within the patent grant, or whether the patentee has ventured beyond the patent grant and into behavior having an anticompetitive effect not justifiable under the rule of reason."<sup>174</sup>

Displaying genuine concern for the patent owner's right to exclude others, the court of appeals incorporated the right to exclude in the analysis of whether the restriction on the sale of a patented product is valid. The court was cautious not to limit the right to exclude others from making, using or selling the patented invention granted to patent owners. However, the majority opinion by the Federal Circuit Court of Appeals in *ULSI* did not exercise the same caution in limiting the patent owner's right to exclude or even appear to recognize its existence as a meaningful right.

### CONCLUSION

As stated by Circuit Judge Plager in *ULSI*, "[A] sensible and socially desirable agreement between Intel and HP is turned into an unintended gift to all manner of infringers. The result creates a disincentive among competitors to invent rather than litigate, potentially disadvantaging companies in a volatile industry such as this in competing world-wide."<sup>175</sup> The majority opinion in the *ULSI* decision set a precedent that will lead to inequitable results in future cases, as it did in the present case. *ULSI* provides a disincentive for patent procurement and creates an uncertainty for companies presently in or entering into patent cross-license agreements.

The *ULSI* majority disregarded the effects this case has on the patent system. The success of the patent system is due largely in part to the seventeen-year monopoly that the inventor is given for disclosing his invention to the public to "promote science and the useful arts."<sup>176</sup> After *ULSI*, the exclusive right granted to the patent owner to make, use or sell the patented invention is limited if an unlicensed third party is allowed to "sanitize" an infringing product through a foundry agreement. This result is inequitable and the courts should be cautious before setting precedent which limits the right of a patent

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171. *Mallinckrodt, Inc. v. Medipart, Inc.*, 15 U.S.P.Q.2d 1113, 1120 (N.D. Ill. 1990), *rev'd in part, vacated in part*, 976 F.2d 700 (Fed. Cir. 1992).

172. *Mallinckrodt*, 976 F.2d at 706-08 (citing *Adams v. Burke*, 84 U.S. (17 Wall.) 453 (1874)).

173. *Id.* at 708 (citing *United States v. Univis Lens Co.*, 316 U.S. 241 (1942)).

174. *Id.* The patent grant to which the court refers is the right granted to the patentee to exclude others from making, using or selling the invention for a term of seventeen years. 35 U.S.C. § 154 (1988).

175. *ULSI*, 995 F.2d 1566, 1575 (Fed. Cir. 1993) (Plager, J., dissenting), *cert. denied*, 114 S. Ct. 923 (1994).

176. See *supra* notes 12-13 and accompanying text.

owner.<sup>177</sup> Reducing the inventor's incentive to disclose his invention to the public will do nothing but harm the patent system.

Patent cross-licensing agreements provide a socially desirable result by allowing companies to appropriate their resources to research and development instead of litigating patent rights. The *ULSI* reasoning will negatively impact the use of patent cross-license agreements that are prevalent among companies today. After *ULSI*, parties entering into a cross-licensing agreement must predict and set forth in their agreement with specificity any undesirable situations that might arise. In particular, after *ULSI*, if the parties to a cross-license agreement do not want an unlicensed third party to be able to sanitize an infringing product through a licensed foundry, they must expressly set forth that condition in the agreement.

One commentator reviewing the *ULSI* case would rely on a "sham transaction" analysis to determine whether unlicensed third parties to a cross-licensing arrangement can sanitize infringing products through a licensed foundry.<sup>178</sup> Mr. Richard H. Abramson states that parties to a cross-licensing agreement can act as foundries unless (1) the cross-license sets forth that the licensed parties cannot act as foundries or (2) the foundry relationship between the foundry and third party is a "sham transaction."<sup>179</sup> Mr. Abramson defines a "sham transaction" as one that is "designed solely to circumvent the patent laws."<sup>180</sup> However, Mr. Abramson draws the line at what conduct "circumvents the patent laws" at a very low level, so that the foundry agreement in the *ULSI* case does not constitute a sham transaction.<sup>181</sup> For example, Mr. Abramson would find a sham transaction where the unlicensed party manufactures the product under the licensed party's rights and then briefly passes title to the finished product through the licensed party, who then sells the product back to the unlicensed party.<sup>182</sup> Mr. Abramson justifies defining a sham transaction at such a low level by stating that foundry agreements are an economically efficient way for small design companies to remain competitive in today's global economy.<sup>183</sup>

Although it is easy to agree that foundry agreements are desirable for small design firms in today's global economy, small design firms should not be permitted to produce infringing products that they themselves cannot make by applying the patent exhaustion doctrine. Instead, the design firm can: (1) design a noninfringing product and produce it through a foundry agreement or (2) design a product that would infringe a patent, obtain a license to use that patent, and produce the product through a foundry agreement.

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177. *See supra* note 14 and accompanying text.

178. Richard H. Abramson, *When the Chickens Come Home To Roost: The Licensed Foundry Defense In Patent Cases*, COMPUTER L., Mar. 1993, at 1. Mr. Abramson was counsel of record for Chips & Technologies, Inc. in Nos. C-92-20111 and C-92-20112 (N.D. Cal. 1992). The case involved the same patent exhaustion doctrine question as in *ULSI* but was settled before the court addressed the patent exhaustion issue.

179. Abramson, *supra* note 178, at 1.

180. Abramson, *supra* note 178, at 1.

181. Abramson, *supra* note 178, at 8-9.

182. Abramson, *supra* note 178, at 8-9. *See* E.I. du Pont de Nemours & Co. v. Shell Oil Co., 227 U.S.P.Q. 233 (Del. Supr. 1985).

183. Abramson, *supra* note 178, at 2.

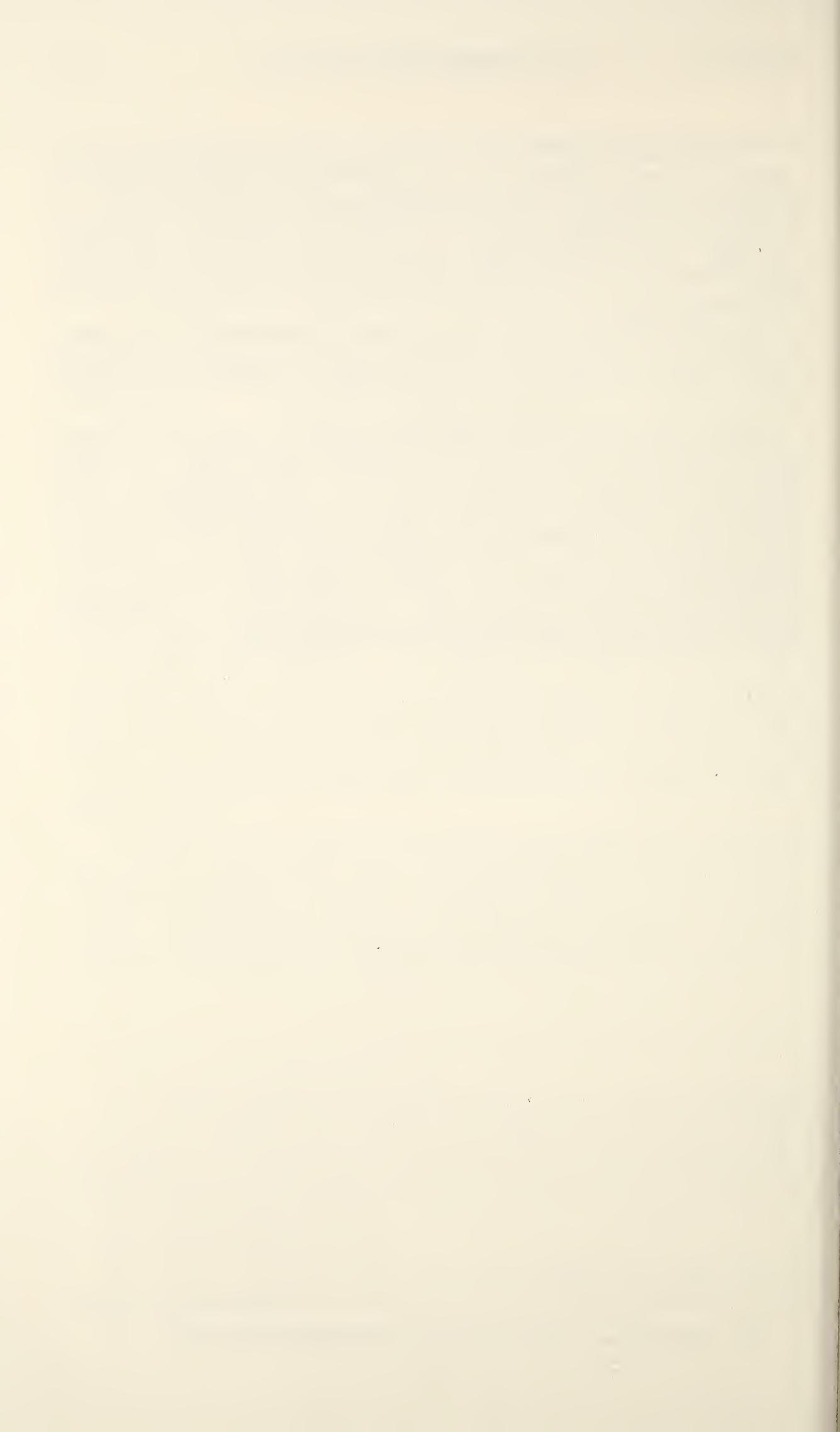
Another suggested guideline for courts to use involves the allocation of the burden of proof. In a patent infringement case, the alleged infringer has the burden of proving a defense to infringement.<sup>184</sup> Thus, the unlicensed third party has the burden of proving its defense for infringement. However, to fully carry out the intention of the *Atmel* court, the alleged infringer should also have a heightened burden of showing evidence of the intent of the parties in the cross-license agreement to allow foundry agreements with unlicensed third parties.

The broad rule announced in *Atmel* represents the best approach to this problem. Under this rule, an unlicensed third party may use the patent exhaustion doctrine as a defense to patent infringement only if the cross-license agreement expressly states that foundry agreements with unlicensed third parties are permitted.

Following the broad rule of the *Atmel* decision would remove the concerns created by the *ULSI* decision. However, if courts follow *ULSI* and require that the cross-license agreement or other evidence show that the parties to the cross-license agreement did not intend to allow foundry agreements, then the courts should not allow the patent exhaustion doctrine to be used as a defense to patent infringement if either of the following two situations is present: (1) if the cross-license agreement prevented sublicensing, then the relationship between the licensed foundry and the unlicensed third party should not result in a sublicense; or (2) the relationship between the licensed foundry and the unlicensed foundry should result in the sale of products rather than the sale of services.

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184. *Met-Coil Systems v. Kornes Unlimited, Inc.*, 803 F.2d 684, 687 (Fed. Cir. 1986).



# THERE GOES THE NEIGHBORHOOD: NOTIFYING THE PUBLIC WHEN A CONVICTED CHILD MOLESTER IS RELEASED INTO THE COMMUNITY

ELIZABETH KELLEY CIERZNIAK\*

When convicted child rapist Joseph Gallardo was released from prison in July 1993, he received an unusually warm welcome from his new neighbors in Snohomish County, Washington.

The day before his release, about 300 angry residents rallied on the front lawn of the modest home where Gallardo planned to live. Hours later, the house was burned to the ground.<sup>1</sup>

At the time of the Gallardo incident, laws in most states allowed convicted child molesters to slip back into the community unnoticed and unheralded. The Washington legislature, however, tried a different tactic in 1990 following the sexual mutilation of a seven-year-old boy in their state.

Washington's Community Protection Act of 1990 authorizes a public law enforcement agency to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection.<sup>2</sup> The type of information released and the method of dissemination is left to the discretion of local law enforcement officials.<sup>3</sup> These officials are granted immunity from civil liability for releasing or failing to release sex-offender information.<sup>4</sup>

Gallardo was convicted of raping the ten-year-old daughter of a family friend.<sup>5</sup> Five days before his parole, the Snohomish County sheriff's office delivered 1000 pamphlets door-to-door featuring a mug shot of Gallardo, a description of his crime, and the fact that he did not receive any treatment in prison.<sup>6</sup>

Based on drawings found in Gallardo's prison cell, the pamphlet called him an "extremely dangerous untreated sex offender with a very high probability for re-offense,"<sup>7</sup>

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1. Doug Conner, *Did Flyer on Sex Offenders Release Invite Vigilantism?*, L.A. TIMES, July 22, 1993, at A5.

2. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

3. *Id.* See Mary Anne Kircher, *Registration of Sex Offenders: Would Washington's Scarlet Letter Approach Benefit Minnesota?* 13 HAMLINE J. PUB. L. & POL'Y 163 (1992). The author provides an overview of community notification procedures employed by local law enforcement agencies in Washington state prior to the Gallardo notification. *Id.*

4. WASH. REV. CODE ANN. § 4.24.550 (granting immunity for any discretionary decision to release relevant and necessary information, unless the official, employee, or agency acted with gross negligence or in bad faith).

5. Conner, *supra* note 1.

6. Larry Pynn, *Taking Things Too Far: Washington's Sex Offender Law Reveals Serious Pitfalls*, VANCOUVER SUN, July 23, 1993, at B3.

7. Conner, *supra* note 1.

and described the first-time offender as having "sadistic and deviant sexual fantasies of torture, human sacrifice, bondage, and murder involving children."<sup>8</sup>

The vigilanism sparked by Gallardo's release fanned the flames of the continuing controversy over how the public should be notified when a convicted child molester is living in its midst. At the end of 1993, only two states, Washington<sup>9</sup> and Louisiana,<sup>10</sup> had laws on their books that provided for widespread, proactive community notification when a person convicted of sex crimes against a child is released from custody, placed on probation, or granted parole.<sup>11</sup> By mid-1994, five more states had adopted measures which opened sex offender registries to public scrutiny,<sup>12</sup> and Congress had enacted legislation that authorized law enforcement officials in every state to release information that is necessary to protect the public from child sex offenders.<sup>13</sup>

As reports of sexual abuse and violence against children continue to climb and prison populations swell to capacity, policy-makers will be forced to grapple with the issue of how the public should be put on notice when a potentially dangerous child molester is released from prison or placed on probation. This Note will examine the pragmatic and legal issues raised by community notification statutes. Part I provides an overview of state and federal legislative solutions to tracking child sex offenders. Part II sketches the Washington, Louisiana and federal statutory approaches to community notification. Part III analyzes community notification statutes in light of potential constraints, including the Ex Post Facto Clause, the Eighth Amendment, the Due Process Clause, and the right to privacy. Finally, Part IV of this Note proposes a statutory scheme for public notification.

## I. AN OVERVIEW OF LEGISLATIVE SOLUTIONS

The *Journal of the American Medical Association* has defined child molesters as "older persons whose conscious sexual desires or responses are directed, at least in part, toward dependent, developmentally immature children and adolescents who do not fully comprehend these actions and are unable to give informed consent."<sup>14</sup> Each year in the

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8. Pynn, *supra* note 6.

9. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

10. LA. REV. STAT. ANN. §§ 15:540-.549 (West Supp. 1994).

11. Other states allowed public disclosure under limited circumstances. Maine requires that persons convicted of gross sexual assault against victims under the age of 16 to register with the state; however, criminal history information on persons who have been released from the criminal justice system is only available in response to a specific inquiry that includes a name, date, and charge. ME. REV. STAT. ANN. tit. 16, § 612 (West 1983) & tit. 34-A, § 11001 (West Supp. 1993). The Montana statute does not expressly prohibit public access. MONT. CODE ANN. §§ 46-18-254, 46-23-501 to -507 (1993). The North Dakota registry is open to the public; however, the statute does not provide for any form of proactive community notification. N.D. CENT. CODE § 12.1-32-15 (Supp. 1993).

12. ALASKA STAT. §§ 11.56.840, 12.63.010, 12.63.020, 12.63.100, 18.65.087, 28.05.048, 33.30.012, 33.30.035, 33.30.901 (1994); GA. CODE ANN. § 42-9-44.1 (1994); IND. CODE ANN. §§ 5-2-12-1 to -13 (West 1994); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1993); 1994 Tenn. Pub. Acts 976 (to be codified at TENN. CODE ANN. §§ 40-39-101 to -108).

13. 42 U.S.C.A. § 14071 (West 1994).

14. A. Kenneth Fuller, M.D., *Child Molestation and Pedophilia: An Overview for the Physician*, 261

United States, between 100,000 and 500,000 children are sexually molested;<sup>15</sup> however, research indicates that as few as six percent of child molestations are ever reported.<sup>16</sup> Acts of abuse are rarely a one-time occurrence; an individual child molester may "commit hundreds of sexual acts on a staggering number of children."<sup>17</sup> While the majority of sex crimes against children are committed by relatives, such as parents or siblings, a substantial portion of offenders have either established a relationship with the child for the sole purpose of molesting or are strangers to their victims.<sup>18</sup>

Child molesters are everywhere—in churches, schools, neighborhoods, and homes. In recent years, state legislatures across the country have struggled with ways to increase community protection while keeping costs down and meeting federal mandates for prison population size. One popular approach has been to strengthen existing laws by requiring released sex offenders to register with law enforcement officials or state agencies.<sup>19</sup> Thirty-nine states have laws that require persons convicted of certain sex offenses to register.<sup>20</sup> All but five of these statutes have been adopted during the past decade, with

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JAMA 602, 602 (1989) (footnote omitted). The article also describes pedophilia as "recurrent, intense sexual urges and . . . fantasies that involve sexual activity with prepubescent children (generally age 13 or younger). In addition, the pedophile . . . either must have acted on these urges or must be markedly distressed by them." *Id.* For purposes of this Note, the term "child molester" will be used to denote both child molesters and pedophiles.

15. *Id.*

16. *Id.* at 603.

17. *Id.*

18. DIVISION OF FAMILY AND CHILDREN, INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, DEMOGRAPHIC TREND REPORT 186 (1993). During fiscal year 1993, 49.8% of perpetrators in substantiated and indicated cases of child sexual abuse were related to their victims. Over a quarter of all perpetrators—27.3%—were natural parents, adoptive parents or step-parents. Conversely, 35.8% of all perpetrators did not have an established relationship with the child.

19. ROXANNE LIEB ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 2 (Feb. 1994). States' approaches are varied, but generally the registries include at a minimum the name, address and a law enforcement identification number. Some states collect detailed information, which may include blood samples, employment information, residence history and vehicle registration numbers. Offenders who do not comply are penalized. *Id.* The time-frame for registering ranges from immediately upon release to 30 days; the duration of the requirement varies from five years to life, and is typically 10 years or longer. *Id.* at 8, 15-18. Some states register only child molesters; some register only repeat offenders or the most serious categories of offenders; and some register all sex offenders, regardless of the seriousness of the crime or the age of the victim. *Id.* at 2-3, 15-18.

20. ALA. CODE §§ 13A-11-200 to -203 (1994); ALASKA STAT. §§ 11.56.840, 12.63.010, 12.63.020, 12.63.100, 18.65.087, 28.05.048, 33.30.012, 33.30.035, 33.30.901 (1994); ARIZ. REV. STAT. ANN. §§ 13-3821 to -3824 (1989 & SUPP. 1993); ARK. CODE ANN. §§ 12-12-901 to -909 (Michie Supp. 1993); CAL. PENAL CODE §§ 290, 290.1, 290.5 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1994); DEL. CODE ANN. tit. 11, § 4120 (1994); FLA. STAT. ANN. §§ 775.13, 775.21-.23 (West 1992 & Supp. 1994); GA. CODE ANN. § 42-9-44.1 (1994); IDAHO CODE §§ 18-8301 to -8311 (Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150/1-10 (Smith-Hurd 1992 & Supp. 1994); IND. CODE ANN. §§ 5-2-12-1 to -13 (West Supp. 1994); KAN. STAT. ANN. §§ 22-4901 to -4910 (Supp. 1993); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); LA. REV. STAT. ANN. §§ 15:540-.549 (West Supp. 1994); ME. REV. STAT. ANN. tit. 34-A, §§ 11001 - 11004 (West Supp. 1993); 1994

fifteen states enacting sex offender registries in the last year alone. The recently enacted federal crime bill requires each state to establish a sex offender registry or face a ten percent cut in federal anti-crime dollars.<sup>21</sup>

In conjunction with registration laws, state legislatures have adopted other measures aimed at protecting communities from convicted child molesters, including criminal history background checks and notification programs.<sup>22</sup> Five different audiences may be targeted with proactive notification programs: victims and witnesses connected to specific offenders,<sup>23</sup> law enforcement agencies,<sup>24</sup> school districts and child care facilities,<sup>25</sup> volunteer organizations serving children,<sup>26</sup> and citizens in a particular neighborhood or community.<sup>27</sup> In addition, some states have opened their registries to the public, allowing any citizen to check and see if their next door neighbor or youth group leader has a record of sex offenses against children.<sup>28</sup>

Washington and Louisiana were the first states to adopt proactive legislation aimed at fostering widespread public awareness when persons convicted of sex offenses against a child are released into the community. In providing for community notification, the legislatures in Washington and Louisiana used nearly identical language to explain their rationale.

The legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that

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Mich. Pub. Acts 295; MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1994); 1994 Miss. Laws 514; 1994 Mo. Legis. Serv. 693 (Vernon); MONT. CODE ANN. §§ 46-18-254, 46-23-501 to -507 (1993); NEV. REV. STAT. ANN. §§ 207.151-157 (Michie 1992 & Supp. 1993); N.H. REV. STAT. ANN. §§ 632-A:11-19 (Supp. 1993); N.D. CENT. CODE § 12.1-32-15 (Supp. 1993); 1994 N.J. Sess. Law Serv. 128 (West); OHIO REV. CODE ANN. §§ 2950.01-08 (Anderson 1993); OKLA. STAT. ANN. tit. 57, §§ 581-587 (West 1991 & Supp. 1994); OR. REV. STAT. §§ 181.507-.519 (1991 & Supp. 1994); R.I. GEN. LAWS § 11-37-16 (Supp. 1993); 1994 S.C. Acts 497 (to be codified at S.C. CODE ANN. §§ 23-3-400 to -490 (Law. Co-op.)); 1994 S.D. Laws 1349; 1994 Tenn. Pub. Acts 976 (to be codified at TENN. CODE ANN. §§ 40-39-101 to -108); TEX. REV. CIV. STAT. ANN. art. 6252-13.c.1 (West Supp. 1994); UTAH CODE ANN. § 77-27-21.5 (1990 & Supp. 1994); VA. CODE ANN. §§ 19.2-298.1 to 298.3, 19.2-390.1, 53.1-116.1 (Michie 1994); WASH. REV. CODE ANN. §§ 9A.44-130, 9A.44.140 (West Supp. 1994); W. VA. CODE §§ 61-8F-1 to -8 (Supp. 1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-301 to -306 (Supp. 1994).

21. 42 U.S.C.A. § 14071 (West 1994).

22. ROXANNE LIEB & BARBARA E.M. FELVER, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER REGISTRATION, A REVIEW OF STATE LAWS 5 (May 1992).

23. See, e.g., OR. REV. STAT. § 181.519 (1991 & Supp. 1994). However, a victim's access to the notification program is revoked if the information is made public.

24. See sources cited in *supra* note 20. All states with sex offender registries provide access to law enforcement.

25. See, e.g., ILL. REV. STAT. ch. 730, para. 150/1-9 (Smith-Hurd 1992 & Supp. 1994); NEV. REV. STAT. ANN. §§ 207.155-.157 (Michie 1992 & Supp. 1993).

26. See, e.g., IND. CODE ANN. § 5-2-12-11 (West Supp. 1994).

27. LA. REV. STAT. ANN. §15:540 (West Supp. 1994); WASH. REV. CODE ANN. §§ 9A.44-130, 9A.44.140 (West Supp. 1993).

28. See, e.g., GA. CODE ANN. § 42-9-44.1 (1994).

protection of the public from sex offenders is a paramount governmental interest . . . . [R]estrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety. Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies, and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of these goals.<sup>29</sup>

Whether widespread community notification furthers the stated goal of public safety remains unanswered. Disclosure has helped to prevent some child molesters from striking,<sup>30</sup> at the same time, however, community notification has resulted in scattered instances of vigilantism and harassment against offenders and members of their family.<sup>31</sup> Hounded by an angry public, released offenders may find themselves evicted and unemployed.<sup>32</sup> In order to integrate into society, some child molesters have been forced to go underground or relocate to a community or state where they can live in anonymity.<sup>33</sup>

Thus, public notification can be self-defeating if it drives offenders from a community that knows about their criminal history into territory where they are anonymous. Pedophilia is believed to be a lifelong affliction;<sup>34</sup> however, after a child molester's period of probation or parole ends, he or she may simply relocate to a state that closes its sex offender registry to the public or has not adopted proactive community

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29. WASH. REV. CODE ANN. § 4.24.550 note (West Supp. 1994) (Historical and Statutory Notes). See also LA. REV. STAT. ANN. § 15:540 (West Supp. 1994). The Louisiana statute replaces the word "predator" with "offender."

30. Katherine Seligman, *Molesters' "Scarlet Letter" Bill: Is Public Disclosure an Invasion of Privacy?*, S.F. EXAMINER, March 6, 1994, at A1.

31. WASPC SEX OFFENDER AD HOC COMMITTEE, WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS, PRELIMINARY REPORT 6 (1992). Of the 52 law enforcement agencies that had implemented community notification, 14 said that community reaction resulted in safety problems for either the offender or his family. A survey conducted by the Washington Institute for Public Policy yielded similar results. See SHEILA DONNELLY & ROXANNE LIEB, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION: A SURVEY OF LAW ENFORCEMENT 7 (1993). A total of 14 cases of harassment were reported in 12 jurisdictions; 30 jurisdictions reported no instances of harassment. In half of the 14 cases, the harassment extended to members of the offender's family or people living with the offender. *Id.* Both surveys were conducted prior to the Gallardo notification.

32. Conner, *supra* note 1.

33. Daniel Golden, *Sex-Cons*, BOSTON GLOBE, April 4, 1993 (Magazine), at 12. The Washington Institute for Public Policy also reports that "offenders subject to notification frequently leave the community, and sometimes the state." DONNELLY & LIEB, *supra* note 31, at 7.

34. See *supra* text accompanying note 14.

notification. Interstate agreements even make it possible for offenders to move to another state while on probation or parole.<sup>35</sup>

In 1992, a felony sex offender from Arkansas wanted to move to a state where there was no law requiring him to tell police where he lived and worked. His brother encouraged the offender to move to Kentucky after authorities told him the state did not have a sex offender registry.<sup>36</sup> Upon hearing this story, the co-chairman of the Kentucky Attorney General's Task Force on Child Sexual Abuse was quoted as saying, "There's a lot of things we want our state known for. A safe haven for sex offenders isn't one of them."<sup>37</sup>

Apparently, officials in other states share this view, with an increasing number of legislatures adopting registries. Until recently, however, the fervor for notification was not as strong; most existing state registries limited disclosure to law enforcement agencies<sup>38</sup> or organizations and agencies responsible for the care and custody of children.<sup>39</sup> A few state registry laws even imposed criminal penalties on persons who released information.<sup>40</sup>

The recently enacted Violent Crime Control and Law Enforcement Act of 1994 changed the landscape, however, by authorizing limited community notification in states complying with the registration provisions of the law.<sup>41</sup> Under this permissive language, states that currently do not have community notification are not required to change their

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35. NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE 397-98 (1983). The Interstate Compact for the Supervision of Parolees and Probationers allows persons convicted and placed on probation or parole in one state to reside in another state and have their parole or probation supervised by authorities there. If offenders are residents or have family in the receiving state and are able to obtain employment, the receiving state is obligated to accept supervision. Even if the offender is not a resident and does not have a family member who is a resident, the receiving state may still consent to the move. All states have entered into the compact. *Id.* at 397-99.

36. Valarie Honeycutt, *Task Force Pushing Sex Abuser Registry*, LEXINGTON HERALD-LEADER, Oct. 19, 1992, at B1.

37. *Id.* The Kentucky legislature adopted a sex offender registry in 1994. KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994).

38. ALA. CODE § 13A-11-202 (1994); ARIZ. REV. STAT. ANN. § 13-3823 (1989); ARK. CODE ANN. § 12-12-909 (Michie Supp. 1993); CAL. PENAL CODE § 290 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-3-412.5 (West Supp. 1994); FLA. STAT. ANN. § 775.22 (West 1992 & Supp. 1994); ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1994); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); 1994 Mich. Pub. Acts 295; MINN. STAT. ANN. § 243.166 (West 1992 & Supp. 1994); 1994 Miss. Laws 514; 1994 Mo. Legis. Serv. 693 (Vernon); N.H. REV. STAT. ANN. § 632-A:17 (Supp. 1993); OHIO REV. CODE ANN. § 2950.08 (Anderson 1993); OKLA. STAT. ANN. tit. 54, § 24A.8 (West 1991 & Supp. 1994); R.I. GEN. LAWS § 11-37-16 (Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994); W. VA. CODE § 61-8F-5 (1994); WIS. STAT. ANN. § 175.45 (West Supp. 1994); WYO. STAT. §§ 7-19-303 (Supp. 1994).

39. DEL. CODE ANN. tit. 11, § 4120 (1994); NEV. REV. STAT. ANN. § 207.155 (Michie 1992 & Supp. 1993); 1994 S.D. Laws 1349; UTAH CODE ANN. § 77-27-21.5 (1990 & Supp. 1994); VA. CODE ANN. § 19.2-390.1 (Michie 1994).

40. ILL. ANN. STAT. ch. 730, para. 150/9 (Smith-Hurd 1992 & Supp. 1994); KY. REV. STAT. ANN. § 17.500-.540 (Baldwin 1994); TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994).

41. 42 U.S.C.A. § 14071 (West 1994).

policies. States with broad notification provisions, however, may be forced to narrow their laws or face cuts in federal funding.<sup>42</sup> Because the concept of public notification is gaining popularity, many state legislatures will debate the issue in the near future as they create sex offender registries or tailor existing registries to meet the requirements of the federal law. The Washington and Louisiana approaches can provide a useful blueprint for avoiding constitutional pitfalls and crafting a notification program that protects the public.

## II. STATUTORY APPROACHES

### *A. Washington's Community Protection Act*

Washington's community notification law was adopted in 1990 following a series of violent sexual assaults which fueled public outrage that the criminal justice and mental health systems did not adequately protect citizens from sex offenders.<sup>43</sup> The notification provision was included in the Community Protection Act of 1990, a sweeping measure that provides for civil commitment of sexual offenders who are deemed to be violent predators, registration of adult and juvenile sex offenders, state services to victims, offender treatment programs, and community notification when a sex offender or violent criminal is released from prison.<sup>44</sup>

Decisions regarding community notification are made by local law enforcement agencies when an offender registers or when a "Special Bulletin" is received from the Department of Corrections. Special Bulletins are issued about two weeks before an offender is released from a state correctional or mental health facility,<sup>45</sup> and contain the address where the offender intends to live upon release, if known, a photograph, and a detailed psychological and criminal profile.<sup>46</sup>

The decision to issue Special Bulletins is made by the End-of-Sentence Review Committee, a seven-member panel comprised of representatives from Community Corrections; the Indeterminate Sentencing Review Board; and the state divisions of Prisons, Offender Programs, Mental Health, Developmental Disabilities, and Child Protective Services.<sup>47</sup> The committee surveys the records of all sex offenders about to be released from state institutions and issues Special Bulletins on those offenders deemed to pose a serious public safety risk.<sup>48</sup> In the three years following passage of the Community

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42. *Id.*

43. LIEB & FELVER, *supra* note 22, at 8. Following the 1988 rape and murder of a Seattle woman by a twice-convicted sex offender on work release from prison, and the 1989 abduction and sexual mutilation of a seven-year-old Tacoma boy by a man with a long history of violent assaults on children, the governor appointed a Task Force on Community Protection that recommended a comprehensive law relating to community protection from sex offenders.

44. 1990 Wash. Laws 3.

45. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Nov. 10, 1993).

46. WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, THE 1990 COMMUNITY PROTECTION ACT: TWO YEARS LATER 17 (1992).

47. *Id.*

48. DONNELLY & LIEB, *supra* note 31, at 3.

Protection Act, 2216 sex offenders were released from Washington's prisons; 415 of these offenders, or twenty percent, were the subject of Special Bulletins.<sup>49</sup> Under guidelines adopted by the committee following the Gallardo release, Special Bulletins are generally limited to convicted child sex offenders who fit the statutory definition of a sexually violent predator: any person who suffers from a mental abnormality or personality disorder, which makes the offender likely to engage in acts of sexual violence toward strangers or children with whom a relationship has been established for the primary purpose of victimization.<sup>50</sup>

Local law enforcement officials are granted discretion to release the information contained in Special Bulletins and the sex offender registry to other agencies, groups or persons in the community.<sup>51</sup> To help encourage departments to adopt a community notification policy, the Washington Association of Sheriffs and Police Chiefs (WASPC) developed a voluntary three-tiered system to regulate dissemination of sex offender information.<sup>52</sup>

Under the WASPC guidelines, Level I notification is used when the risk of re-offense is the lowest.<sup>53</sup> The information is maintained within the police department and disseminated to other appropriate law enforcement agencies. A photograph of the offender may be included in a Level I notification.<sup>54</sup> Level II, which is implemented when the offender poses a moderate risk of re-offense, includes the actions within Level I, and in addition, schools and neighborhood groups may be notified.<sup>55</sup> These groups are responsible for distributing the information to their constituencies. Level III, reserved for the highest-risk offenders, broadens the scope of notification to include press releases.<sup>56</sup>

Most law enforcement agencies have adopted the recommended policies verbatim, while others use the guidelines as a starting point for discussion.<sup>57</sup> In some counties,

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49. DONNELLY & LIEB, *supra* note 31, at 3. This represented about six percent of the total number of adult sex offenders registered in Washington state during that time period. As of August 1993, 6982 adult sex offenders had registered, with an overall compliance rate of 80%. Based on Department of Corrections' records, 1719 adult sex offenders who were released from prison did not meet their statutory obligation to register. DONNELLY & LIEB, *supra* note 31, at 2.

50. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Aug. 24, 1994). See WASH. REV. CODE ANN. § 71.09.020 (West 1992 & Supp. 1994).

51. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994) (authorizing public agencies to release relevant and necessary information regarding sex offenders when the release of the information is necessary for public protection).

52. Memorandum from the Washington Association of Sheriffs & Police Chiefs (May 21, 1990) (on file with the author).

53. DONNELLY & LIEB, *supra* note 31, at 3.

54. DONNELLY & LIEB, *supra* note 31, at 3.

55. DONNELLY & LIEB, *supra* note 31, at 3.

56. DONNELLY & LIEB, *supra* note 31, at 3. From February 1990 to March 1993, law enforcement agencies using the WASPC guidelines identified 2947 Level I offenders, 98 Level II offenders, and 78 Level III offenders. DONNELLY & LIEB, *supra* note 31, at 4.

57. ROXANNE LIEB ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION PRESS REVIEW 1 (1992). See also WASPC SEX OFFENDER AD HOC COMMITTEE, *supra* note 31,

newspaper editorial boards set policies governing publication of sex offender information.<sup>58</sup> Because no requirement compels local agencies to notify the public when a sex offender is released, and no clear-cut statutory guidelines govern notification, results vary widely from community to community.<sup>59</sup> How offenders fare upon release may depend on whether they set up residence in a small town or slip into the anonymity of a larger city.<sup>60</sup>

Nine months after the Gallardo incident, the Washington Supreme Court had the opportunity to consider the 1990 notification language in *State v. Ward*,<sup>61</sup> a challenge to the sex offender registration law. Stressing that the legislature imposed "significant limits" on whether an agency may release registrant information, what it may disclose, and where it may target the release of information,<sup>62</sup> the court held that disclosure is only justified if there is evidence of an offender's future dangerousness.<sup>63</sup> This requirement, combined with the legislature's primary goal of protecting the public, "obligates the disclosing agency to gauge the public's potential for violence and draft the warning accordingly. An agency must disclose only that information relevant to and necessary for counteracting an offender's dangerousness."<sup>64</sup> The court added that the "scope of the disclosure must relate to the scope of the danger" and that the content of the warning depends on the offender's proximity.<sup>65</sup> Thus, an agency may decide to limit notification to schools and day care centers, or it may provide the offender's next-door neighbors with a warning that is more detailed than the warnings provided to persons less at risk. Opening the entire registry for examination by the public, as some counties were doing,<sup>66</sup> is clearly prohibited by the restrictive language of *Ward*.

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at 5. WASPC conducted a mail-in survey of police chiefs and sheriffs from July 24, 1992 to September 17, 1992. Of the 80 agencies responding (40% response rate), 47 said they used the WASPC three-tiered system. *But see DONNELLY & LIEB, supra* note 31, at 4. In March 1993, the Washington Institute for Public Policy surveyed sheriffs in all 39 counties and the police chiefs of the state's 10 largest cities. Of the 42 jurisdictions responding, 93% said they used the WASPC guidelines.

58. LIEB ET AL., *supra* note 57. This report compiles the press clippings of eight offenders in the state of Washington who were subject to Level III notification. *See also* Golden, *supra* note 33, at 12. Golden reports that the *Bellingham Herald* prints the offender's name, address, photo and license plate number, while the *Valley Daily News*, in Kent, does not identify the offender. In Seattle, police stopped releasing addresses after a sex offender was assaulted at his home, and now divulge only the block where the offender lives. Whenever the department does issue a news release, it is usually ignored by the media.

59. WASPC SEX OFFENDER AD HOC COMMITTEE, *supra* note 31, at 5. Only 52 of the 80 agencies responding to the 1992 survey said they had notified the community of specific sex offenders. *See also* Kircher, *supra* note 3, and DONNELLY & LIEB, *supra* note 31, at 13-16 (giving specific examples of implementation policies in Washington).

60. *See supra* text accompanying note 58.

61. 869 P.2d 1062 (Wash. 1994).

62. *Id.* at 1069-70.

63. *Id.* at 1070.

64. *Id.*

65. *Id.* at 1071.

66. Christy Scattarella, *Release of Sex-Offender Date Varies by Jurisdiction*, SEATTLE TIMES, Feb. 20, 1991, at F1.

The legislature also acted swiftly to tighten the notification language in the wake of the Gallardo release. Noting that the public may be alarmed to learn that a released sex offender is moving into the neighborhood, lawmakers found that if adequate notice and information is provided, "the community can develop constructive plans to prepare themselves and their children for the offender's release."<sup>67</sup> An amendment to the 1990 measure requires local law enforcement agencies to make a good faith effort to launch any community notification effort at least fourteen days before the offender is released.<sup>68</sup> In addition, the new language calls for the state Department of Corrections to notify local law enforcement at least thirty days before a sex offender's parole, release, community placement, or work release;<sup>69</sup> previously, only ten days notice was required.<sup>70</sup> According to the legislative findings, the additional time between notification and release will allow communities "to meet with law enforcement . . . , to establish block watches, to obtain information about the rights and responsibilities of the community and the offender, and to provide education and counseling to their children."<sup>71</sup>

### *B. Louisiana's "Scarlet Letter" Law*

A few months before Joseph Gallardo's neighbors-to-be in Washington state received the frightening flyers, residents of Lafayette, Louisiana, were getting a surprise of their own. "Under Act 962 of the 1992 Legislature," the postcards read, "I am required to inform you that I have been convicted of sexual battery. I live at 425 Herbert Rd. and my name is Wilfred Bouton."<sup>72</sup>

In Louisiana, community notification is governed under two companion measures adopted by the 1992 legislature.<sup>73</sup> Act 388 created a sex offender registry.<sup>74</sup> Law enforcement officials are empowered to release relevant and necessary information and are granted immunity from civil liability for damages if they do so, provided the officials did not act with gross negligence or in bad faith.<sup>75</sup> Instead of leaving notification policy to the discretion of the individual communities, as in Washington,<sup>76</sup> the Louisiana law required the Board of Parole to hold public hearings in each of the state's larger cities and to promulgate rules governing notification.<sup>77</sup>

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67. 1994 Wash. Legis. Serv. 129 (West).

68. *Id.*

69. *Id.*

70. To meet this statutory requirement, the Department of Corrections issues teletype dispatches to local law enforcement 30 days before an offender is scheduled to be released. Special Bulletins are usually issued closer to the release date, when the offender's planned destination is known. Telephone Interview with Maureen Ashley, Correctional Program Manager, Washington Department of Corrections (Aug. 24, 1994).

71. 1994 Wash. Legis. Serv. 129 (West).

72. Tracey Tyler, *Law Forces Sex Offenders Out in the Open*, TORONTO STAR, March 27, 1993, at A1.

73. 1992 La. Acts 388 and 1992 La. Acts 962.

74. LA. REV. STAT. ANN. § 15:542 (West Supp. 1994).

75. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994).

76. *See supra* note 51 and accompanying text.

77. LA. REV. STAT. ANN. § 15:547 (West Supp. 1994).

Act 962 specifically targeted sex offenders whose victims were under the age of eighteen.<sup>78</sup> Unlike the Washington statute, which relies on law enforcement agencies, the media, or community groups to notify the public when a child molester moves to town, this law places the burden of community notification on the offender.<sup>79</sup>

Child molesters<sup>80</sup> released on probation<sup>81</sup> or parole<sup>82</sup> are required to mail notices to their neighbors within thirty days of release or establishing residence.<sup>83</sup> Offenders must also publish, at their expense, two notices in the community newspaper that detail their crime, name, and address.<sup>84</sup> In addition, released offenders must contact the superintendent of the school district where they plan to live. The superintendent then has the discretion to notify area principals.<sup>85</sup> A novel provision grants judges and the Board of Parole specific authority to require other forms of notice, including signs, handbills, bumper stickers, or identifying clothing.<sup>86</sup>

As required by statute, the Board of Parole promulgated rules to implement both Acts.<sup>87</sup> Unlike the Washington statute, which vests notification decisions with local law enforcement officials,<sup>88</sup> the Louisiana rules empower only the Board of Parole to release

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78. 1992 La. Acts 962.

79. *Id.*

80. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994). The notification requirement applies to offenders whose victims are under the age of 18 and who have committed the following offenses or an equivalent offense in another jurisdiction: abetting in bigamy, forcible rape, aggravated crimes against nature, incest, aggravated oral sexual battery, indecent behavior with a juvenile, intentional exposure to AIDS, molestation of a juvenile, aggravated sexual battery, oral sexual battery, bigamy, pornography involving a juvenile, carnal knowledge of a juvenile, sexual battery, crimes against nature, and simple rape. *Id.*

81. *Id.*

82. LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1993).

83. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1993) (requires offenders to give notice by mail of the crime for which they were convicted, their name, and their address to neighbors who live within a one-mile radius in a rural area and within three-square blocks in a urban or suburban area).

84. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4.

85. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4.

86. LA. CODE CRIM. PROC. ANN. art. 895; LA. REV. STAT. ANN. § 15:574.4. In other states, judges have imposed probationary sentences requiring child molesters to post yard signs and affix bumper strips to their vehicles that announce their crimes. *See State v. Bateman*, 771 P.2d 314 (Or. Ct. App. 1989), *review denied*, 777 P.2d 410 (Or. 1989) (A convicted sex abuser was required, as a condition of probation, to post signs on his residence and on any vehicle he was operating reading "Dangerous Sex Offender."). *See also Molester Sign Violates Rights, ICLU Claims*, THE INDIANAPOLIS STAR, September 22, 1993, at B1 (A judge sentenced a child molester to 10 years in prison and required him to post signs in his yard for six years after his release, which read, "Warning: No children permitted. A convicted child molester resides in this home.").

87. 19 La. Reg. 1245-47 (1994) (to be codified at LA. ADMIN. CODE tit. 22, § XI).

88. *See supra* note 51 and accompanying text.

sex offender information.<sup>89</sup> No guidance is offered explaining how the release of information should be handled.<sup>90</sup>

While the statute and regulations grant the Board almost complete discretion regarding release of sex offender information, the duty to mail postcards and place classified advertisements applies unilaterally to all child molesters, regardless of the offender's relationship to his victim or extenuating circumstances, such as treatment received while in custody.<sup>91</sup> The offender must locate the addresses of all households within the prescribed mailing area, and bear the cost of mailing the postcards and placing the newspaper advertisements.<sup>92</sup>

### *C. The Violent Crime Control and Law Enforcement Act of 1994*

The Violent Crime Control and Law Enforcement Act of 1994 requires states to enact sex offender registries by August 1997 in compliance with guidelines established by the United States Attorney General.<sup>93</sup> All persons convicted of sex crimes against children are required to register for ten years after they are released from prison or placed on parole or probation.<sup>94</sup> In addition, offenders who are designated as sexually violent predators by the sentencing court are required to register until a determination is made that they no longer suffer from a mental abnormality or personality defect which would make them likely to sexually abuse children whom they either do not know or have befriended for the primary purpose of victimization.<sup>95</sup>

Information collected in approved state registries will be treated as private data, but it may be disclosed to law enforcement agencies for law enforcement purposes or to government agencies conducting confidential background checks. In addition, law enforcement agencies are authorized to release relevant information concerning a specific registrant that is necessary to protect the public. Law enforcement agencies and employees, as well as state officials, are granted immunity from liability if they act in good faith.<sup>96</sup>

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89. 19 La. Reg. 1247 (stating that the Board may release the following information to the general public: name, address, crime convicted, date of conviction, date of release, and any other information that may be necessary and relevant for public protection).

90. *Id.*

91. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1993). Ironically, an offender may petition the court to be relieved of the lesser duty to register. *See* LA. REV. STAT. ANN. § 15:544 (West Supp. 1994) (The court shall consider the nature of the sex offense, the criminal and relevant non-criminal behavior both before and after conviction, and other factors.).

92. Tyler, *supra* note 72, at A1.

93. 42 U.S.C.A. § 14071 (West 1994).

94. *Id.* The registration requirement applies to any criminal offense that consists of the following: kidnapping and false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct or practice prostitution; use of a minor in a sexual performance; any conduct that by its nature is a sexual offense against a minor; or an attempt to commit the listed offenses if made criminal by the state. *Id.*

95. *Id.*

96. *Id.*

The federal language was modeled loosely after the Washington community notification statute. House-Senate conferees who drafted the provision have indicated that they intended it to be given the same interpretation that the Washington Supreme Court gave to its state statute in *State v. Ward*.<sup>97</sup> Under this view, participating states would be prohibited from conducting across-the-board notification on all child sex offenders or from opening the registries to public scrutiny. Disclosure would be limited to relevant information about offenders who pose a threat to public safety.

### III. STATE AND FEDERAL CONSTITUTIONAL AND COMMON LAW CONSTRAINTS

#### *A. Potential Eighth Amendment and Ex Post Facto Problems*

But the point which drew all eyes, and, as it were, transfigured the wearer . . . was that SCARLET LETTER, so fantastically embroidered and illuminated up on her bosom. It had the effect of a spell, taking her out of ordinary relations with humanity, and enclosing her in a sphere by herself.<sup>98</sup>

In *The Scarlet Letter*, Nathaniel Hawthorne tells the tale of Hester Prynne, the fictional adulteress forced to wear a scarlet "A" on her chest. Scorned and segregated from society, Hester Prynne was subjected to the early practice of punishment by humiliation.<sup>99</sup>

Like Hester Prynne, child molesters are singled out when public attention is called to their criminal acts. The stated goal of these so-called "scarlet letter" laws is not punishment nor humiliation,<sup>100</sup> regardless of how punishing or humiliating the effects may prove to be. Instead, the stated goal is community protection—to alert an unwitting public that a potential predator is in its midst.<sup>101</sup>

When the public is put on watch, however, the released child molester may face adverse consequences.<sup>102</sup> Whether community notification will withstand constitutional scrutiny hinges primarily on whether the courts construe these consequences as punishment.<sup>103</sup>

*1. Is Community Notification Punishment?*—The concept of punishment is central to the interpretation of the Eighth Amendment, which proscribes "cruel and unusual

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97. 140 CONG. REC. H8957 (daily ed. August 21, 1994) (statement of Rep. Derrick).

98. NATHANIEL HAWTHORNE, THE SCARLET LETTER 53 (Bantam Classic ed., 1986) (1850).

99. CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 198 (1989). The targeting of reputation, self-esteem, and community standing is a pervasive penal practice. Penalties of degradation widely employed at different times in western legal systems include the pillory, the stool of repentance, and the enforced wearing of large symbolic letters or inscriptions. *Id.* at 199.

100. *See supra* text accompanying note 29.

101. *See supra* text accompanying note 29.

102. *See supra* notes 31-33 and accompanying text.

103. *See generally* Maria Foscarinis, Note, *Toward a Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667 (1980). Courts have approached the definition of punishment by focusing on three different factors: the character of the punisher's intent, the effects suffered by the punished individual, and the power of the punisher. *Id.*

punishments,"<sup>104</sup> and the Ex Post Facto Clause,<sup>105</sup> which prohibits punishments that are imposed retroactively.<sup>106</sup> Statutes creating sex offender registries have been challenged on both bases.<sup>107</sup> Since community notification is a statutory expansion of the sex offender registration concept, analysis of the courts' treatment of such registries is useful in determining whether a court would define community notification as punishment.

*a. Registration and notification as punishment.*—Although courts in Louisiana<sup>108</sup> and California<sup>109</sup> have found registration to be punitive, the majority of cases upholding mandatory registration of sex offenders conclude that registration is not a form of punishment.<sup>110</sup> Two recent cases typify state courts' analysis in this area.

In *State v. Noble*,<sup>111</sup> a convicted child molester who committed his crimes prior to the enactment of Arizona's sex offender registry challenged the retrospective application of the statute. Acknowledging that the registration requirement altered Noble's situation to his disadvantage, the state's high court nonetheless determined that it was not punishment.<sup>112</sup> The Washington Supreme Court reached a similar conclusion in *State v.*

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104. U.S. CONST. amend. VIII. Although originally the Bill of Rights was held to apply only to the federal government, in 1962 the U.S. Supreme Court applied the Cruel and Unusual Punishment Clause to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962), *reh'g denied*, 371 U.S. 905 (1962).

105. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

106. Although the Clause does not employ the term "punishment," courts have generally applied its prohibitions to punishments. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Ex Post Facto Clause prohibits every change in the law that inflicts a greater punishment than the law annexed to the crime at the time it was committed).

107. *See State v. Noble*, 829 P.2d 1217, 1218 (Ariz. 1992); *In re Reed*, 663 P.2d 216, 217 (Cal. 1983). These cases involved challenges under state constitutions; however, the high courts of both states adopted the U.S. Supreme Court's interpretation of federal constitutional language in interpreting parallel clauses in their own states' constitutions. Courts have adopted several different models in analyzing parallel constitutional provisions. *See Mark A. Silverstein, Note, Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215. Under the primacy approach, state courts decide state claims first, and if the state constitution provides the requested relief, the state court need not consider the federal constitutional claim. Under the supplemental approach, state courts first analyze federal constitutional law, and if the Constitution does not provide the requested relief, the court turns to the state constitution as a potential supplement. Some courts follow a dual approach, analyzing state and federal claims together and necessarily adopting the Supreme Court's interpretation as authority. *Id.* at 217. For purposes of discussion, this Note generally follows the dual approach.

108. *State v. Payne*, 633 So. 2d 701, 703 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

109. *In re Reed*, 663 P.2d 216, 220 (Cal. 1983).

110. NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, THE CONSTITUTIONALITY OF STATUTES REQUIRING CONVICTED SEX OFFENDERS TO REGISTER WITH LAW ENFORCEMENT (1993).

111. *State v. Noble*, 829 P.2d 1217 (Ariz. 1992).

112. *Id.* at 1224. *See also People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991) (holding that registration as a sex offender is not punishment for purposes of Eighth Amendment analysis); *State v. Costello*, 643 A.2d 531, 532 (N.H. 1994).

*Ward*,<sup>113</sup> where a convicted statutory rapist unsuccessfully challenged Washington's registration statute as an *ex post facto* law.

The threshold inquiry adopted by both courts was whether the legislature intended the registry to be a means of punishing sex offenders or merely a tool to regulate their activities.<sup>114</sup> The punishment versus regulation analysis has been used by the United States Supreme Court to both uphold<sup>115</sup> and strike<sup>116</sup> statutes that were challenged under the federal Constitution. The inquiry is "whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation."<sup>117</sup>

If the legislative aim is punitive, the registration requirement is treated as punishment.<sup>118</sup> If the legislature indicates a non-punitive purpose, the court must inquire whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention."<sup>119</sup> If no conclusive evidence of legislative intent is available, however, courts considering registration statutes have generally turned to the factors enumerated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*.<sup>120</sup>

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.<sup>121</sup>

*Noble, Ward and State v. Taylor*<sup>122</sup> illustrate the interplay between application of the *Mendoza-Martinez* factors and a conclusive finding of legislative intent. In *Noble*, the Arizona high court applied the *Mendoza-Martinez* factors after ascertaining that the

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113. 869 P.2d 1062 (Wash. 1994).

114. *Noble*, 829 P.2d at 1221; *Ward*, 869 P.2d at 1068.

115. *De Veau v. Braisted*, 363 U.S. 144, 158 (1960), *reh'g denied*, 364 U.S. 856 (1960) (provision of New York Waterfront Commission Act that disqualifies ex-felons from union office is a legitimate means for regulating the waterfront and is not an *ex post facto* law).

116. *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion) (denationalization of a soldier for one day's desertion is cruel and unusual punishment and is not even claimed as a means of solving international problems).

117. *De Veau*, 363 U.S. at 160.

118. *Noble*, 829 P.2d at 1221.

119. *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 250 (1980)). *See also State v. Ward*, 869 P.2d 1962, 1068 (Wash. 1994).

120. 372 U.S. 144, 168-69 (1963). *See also State v. Noble*, 829 P.2d 1217, 1221 (Ariz. 1992); *In re Reed*, 663 P.2d 216, 218 (Cal. 1983); *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991); *State v. Ward*, 869 P.2d 1062, 1068 (Wash. 1994); *State v. Taylor*, 835 P.2d 245, 248 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994).

121. *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

122. 835 P.2d 245 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994).

legislative history did not indicate whether the statute was intended to be punitive or regulatory. The court acknowledged that while Arizona's sex-offender registration statute has both punitive and regulatory effects, its task was not simply to count the factors on each side, but to weigh them.<sup>123</sup> Pointing toward punishment was the court's conclusion that registration has traditionally been regarded as punitive<sup>124</sup> and that the registration requirement serves at least one of the traditional goals of punishment—deterrence.<sup>125</sup> Factors which indicated a non-punitive construction were the court's determination that registration does not affirmatively inhibit or restrain an offender's activities<sup>126</sup> and that the requirement is not excessive in relation to the statute's non-punitive purpose of aiding law enforcement.<sup>127</sup>

Stressing that its decision was "close," the court concluded that the overriding purpose of the registry was to facilitate the location of child molesters by law enforcement personnel, a purpose unrelated to punishment for past offenses.<sup>128</sup> Critical to this finding, however, was the fact that "[r]egistrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential."<sup>129</sup> The provisions in the statute limiting access to the registration information significantly dampen its stigmatic, and thus punitive, effect.<sup>130</sup>

In *Taylor*, the Washington Court of Appeals looked to the legislature's official findings and determined that the registration statute was primarily regulatory in purpose.<sup>131</sup> As such, the *Mendoza-Martinez* factors had no application. The court's inquiry did not end there, however; additional consideration was needed to determine whether the punitive aspects were so burdensome as to amount to a violation of the ex post facto prohibition.<sup>132</sup>

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123. *Noble*, 829 P.2d at 1224.

124. *Id.* at 1222.

125. *Id.* at 1223.

126. *Id.* at 1222.

127. *Id.* at 1223.

128. *Id.* at 1224.

129. *Id.* The information may be released to: non-criminal justice agencies for evaluating prospective employees, public officials, or volunteers; governmental licensing agencies for evaluating prospective licensees; prospective employers and volunteer youth-service agencies whose activities involve regular contact with minors; and the department of economic security and the superior court for determining the fitness of prospective custodians of juveniles. *Id.* at 1222 n.8.

130. *Id.* at 1223. *See also* *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991) (The existence of a stigma requires that knowledge of a registrant's past transgressions be conveyed to the general public, which is unlikely since the statute imposes criminal sanctions on law enforcement officials who disseminate registry information to the public.).

131. *State v. Taylor*, 835 P.2d 245, 246 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994). *See* WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 1993) (noting the legislature's finding that law enforcement's efforts to protect their communities from sex offenders are impaired by the lack of information about convicted sex offenders who live within an agency's jurisdiction).

132. *Taylor*, 835 P.2d at 248.

Acknowledging that the community notification component of Washington's registration statute could restrict change of residence—diminishing chances of employment—and impose a stigma on the offender, the court nonetheless held that these disadvantages were relatively minor and not sufficient to make the statute punitive in its overall effect.<sup>133</sup> Central to the court's analysis was that much of the data in the registry was public information generally available to interested persons who make a reasonable effort to obtain it.<sup>134</sup> In a strongly worded dissent, Judge Agid noted that the "mere fact that bits and pieces of the information appear in various public records does not answer the concern that . . . a sex offender is denied privacy rights such as an unlisted telephone number and address that other convicted felons enjoy."<sup>135</sup> The dissent also noted that groups wishing to find and publicize the location of convicted sex offenders would have ready access to the information, which would add immeasurably to the stigma.<sup>136</sup>

Two years later, the majority view in *Taylor* was reinforced by the Washington Supreme Court in *State v. Ward*.<sup>137</sup> Noting that the *Mendoza-Martinez* factors should be used when a conclusive finding of legislative intent is unavailable,<sup>138</sup> the court nevertheless applied the test to determine whether the registration statute was so punitive as to negate the legislature's clear regulatory intent.<sup>139</sup>

The *Ward* court disagreed with the Arizona Supreme Court's finding in *Noble*, and held that registration has not traditionally been regarded as punitive.<sup>140</sup> Any deterrent effect of registration was secondary to the goal of protecting the public.<sup>141</sup> In addition, neither the requirement of registration nor the potential for public disclosure involved an affirmative disability or restraint because offenders could move freely throughout the state.<sup>142</sup>

Although the *Ward* defendants had not been subject to disclosure, the state's high court embraced the opportunity to interpret the community notification provisions. The court found that because the legislature limited disclosure to instances in which the offender posed a threat to the community, the statutory registration and notification scheme did not impose additional punishment.<sup>143</sup> This limit "ensures that disclosure

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133. *Id.* at 249.

134. *Id.* However, such information is seldom readily available. The fact that government funds are spent to prepare, index, and maintain criminal history files demonstrates that the individual items of information would not otherwise be freely available. *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 764 (1989).

135. *Taylor*, 835 P.2d at 250 (Agid, J., dissenting).

136. *Id.* Such efforts have been launched in Washington. *See Karen Alexander, Sex Offender Map Stirs Controversy, SEATTLE TIMES*, Sept. 24, 1993, at B1.

137. 869 P.2d 1062 (Wash. 1994).

138. *Id.* at 1069.

139. *Id.* at 1068.

140. *Id.* at 1072-73.

141. *Id.* at 1073.

142. *Id.* at 1069.

143. *Id.* at 1069-70. *Contra Artway v. Attorney Gen. of New Jersey*, No. 94-6287, 1995 U.S. Dist. Lexis 2403, at \*91 (D. N.J. Feb. 28, 1995) (holding that the public notification provisions of New Jersey's "Megan's Law" constitute more a form of punishment than a regulatory scheme).

occurs to prevent future harm, not to punish past offenses.”<sup>144</sup> In addition, “[a]ny publicity or other burdens which may result from disclosure arise from the offender’s future dangerousness, and not as punishment for past crimes.”<sup>145</sup>

Acknowledging that high courts in other states, like the court in *Noble*, have held that any punitive effect of registration was mitigated by confidentiality,<sup>146</sup> the *Ward* court nonetheless said that the *Noble* decision supported its holding. In *Noble*, the decisive factor was that the overriding purpose of the registry was to enable law enforcement officials to track down child sex offenders, a purpose unrelated to punishment.<sup>147</sup> Similarly, the overriding purpose of the Washington statute was to protect the public.<sup>148</sup>

A federal district court in New Jersey, however, recently held that the notification provisions of a newly enacted state statute similar to the Washington law<sup>149</sup> constituted more a form of punishment than a regulatory scheme.<sup>150</sup> “Megan’s Law” was hastily adopted in late 1994 by the New Jersey legislature following the brutal rape and murder of seven-year-old Megan Kanka by a twice-convicted sex offender who lived across the street from Megan’s home, unbeknownst to the child or her parents.<sup>151</sup> Although registration information itself is not open to public inspection under the statute, law enforcement agencies are authorized to release relevant and necessary information concerning specific sex offenders in order to protect the public. County prosecutors are charged with the responsibility of determining whether a registrant poses a low, moderate, or high risk. The breadth of community notification is based on the offender’s risk classification.<sup>152</sup>

Applying the *Martinez-Mendoza* factors to the notification provisions of “Megan’s Law,” the court concluded that the legislature’s stated regulatory intent was outweighed by the punitive aspects of community notification.<sup>153</sup> In particular, the court noted that Megan’s Law far exceeded all previous provisions for public access to an individual’s criminal history.<sup>154</sup> Rather than lying potentially dormant in a courthouse record room, sex offenders’ records would remain with them for as long as they live in New Jersey, potentially affecting their ability to return to a normal, private law-abiding life in the community.<sup>155</sup>

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144. *Ward*, 869 P.2d at 1070.

145. *Id.* at 1071.

146. *Id.*

147. *Id.* (citing *Noble*, 829 P.2d 1217 (Ariz. 1992)).

148. *Id.* The court also distinguished its holding from *People v. Adams*, 581 N.E.2d 637 (Ill. 1991), noting that stigma arises not from disclosure, but from private reactions to the crime by members of the general public. *Ward*, 869 P.2d at 1072.

149. 1994 N.J. Sess. Law Serv. 128 (West).

150. *Artway v. Attorney Gen. of New Jersey*, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at \*92 (D. N.J. Feb. 28, 1995).

151. *Id.* at \*4-5.

152. *Id.* at \*5-6 (citing 1994 N.J. Sess. Law Serv. 128 (West)).

153. *Id.* at \*91.

154. *Id.* at \*80.

155. *Id.* at \*79-81.

While the *Mendoza-Martinez* factors have been widely employed in challenges to registration statutes, the Louisiana Court of Appeals used a different analysis to find that registration a was punitive measure. In *State v. Payne*,<sup>156</sup> the court struck the registration requirement as applied to a former church worker who molested five young boys prior to the enactment of the law. Registration could not be imposed as a condition of probation because the legislation authorizing such a condition was not in place at the time the defendant committed his crimes.<sup>157</sup> Nor could it be imposed under the registration statute because the defendant would be sanctioned if he failed to comply.<sup>158</sup> As a result, registration exposed the offender to additional penalties for his criminal conduct, which is prohibited under the Ex Post Facto Clause.<sup>159</sup>

Legislatures considering the adoption of community notification, either in conjunction with the Violent Crime Control and Law Enforcement Act of 1994 or through more aggressive means such as public sex offender registries or Louisiana's "scarlet letter" conditions,<sup>160</sup> have no clear guidance as to whether the courts of their state will deem the provisions punitive and thus subject to Eighth Amendment and ex post facto scrutiny. The handful of courts that have ruled directly on a registration statute that grants immunity to law enforcement officials who disclose information about sex offenders are split. The Louisiana Court of Appeals found its state's registration and notification scheme to be punitive;<sup>161</sup> the Washington Supreme Court held the converse to be true of its state's statute.<sup>162</sup> A federal court in New Jersey recently held that the registration component of a sex offender notification scheme was non-penal, but barred retrospective application of the notification provisions because it found them to be punitive.<sup>163</sup> The high courts of three other states—Arizona,<sup>164</sup> Illinois,<sup>165</sup> and New Hampshire<sup>166</sup>—have deemed their respective states' sex offender registries non-punitive partly because the information is, with few exceptions, kept confidential. One state—California—concluded more than a decade ago that the registration requirements alone imposed punishment under the *Mendoza-Martinez* factors.<sup>167</sup> To date, no state courts have had the opportunity to rule on the punitive effect of a sex offender registry that is open to the general public.

Merely labeling a statute as regulatory will not automatically remove it from punishment analysis.<sup>168</sup> The United States Supreme Court noted in *Trop v. Dulles*, that

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156. *State v. Payne*, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

157. *Id.* at 703.

158. *Id.*

159. *Id.* at 702-03.

160. *See supra* Part II.

161. *State v. Babin*, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994); *State v. Payne*, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

162. *State v. Ward*, 869 P.2d 1062 (Wash. 1994).

163. *Artway v. Attorney Gen. of New Jersey*, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at \*92 (D. N.J. Feb. 28, 1995).

164. *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992).

165. *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991).

166. *State v. Costello*, 643 A.2d 531, 533 (N.H. 1994).

167. *In re Reed*, 663 P.2d 216, 220 (Cal. 1983).

168. *See Foscarinis, supra* note 103, at 1672, for a discussion of the problems inherent in applying the

"even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."<sup>169</sup>

Thus, a statute that opens the sex offender registry to the public or grants immunity to officials who spread the word about released sex offenders will be analyzed for punitive effect regardless of the label or legislative history. If public access to sex offender registries and public release of sex offender information is found to be punitive, as *Noble*<sup>170</sup> and other cases<sup>171</sup> have implied, such provisions would be ripe for Eighth Amendment and *ex post facto* analysis.

*b. Parole and probation conditions as punishment.*—In addition to granting public access to the sex offender registry, the Louisiana legislature also required as a condition of parole or probation that convicted child molesters notify the community through postcards and classified advertisements.<sup>172</sup> Judges and the parole board were granted the express authority to impose additional "scarlet letter" conditions, such as requiring released offenders to post signs or wear special clothing.<sup>173</sup> As with other forms of community notification, these conditions would be vulnerable to Eighth Amendment and *ex post facto* challenges if the goal and effect is found to be punitive.

In *State v. Babin*,<sup>174</sup> the Louisiana Court of Appeals held that applying notification requirements to a defendant who committed his crimes prior to the enactment of the law was an unconstitutional violation of the state and federal Ex Post Facto Clauses. Greg Babin molested his stepdaughter over a period of several years, beginning when the child was in third grade. He was sentenced to four years hard labor, suspended, and placed on supervised probation for five years subject to special conditions. As mandated by statute,<sup>175</sup> these conditions required Babin to mail postcards to his neighbors and contact

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"express punitive intent" test. The author notes that the same statute might be found to impose punishment if passed by a legislature that showed evidence of actual punitive intent and not to impose punishment if passed by a legislature not evidencing such a motive. *Foscarinis*, *supra* note 103, at 1672.

169. *Trop v. Dulles*, 356 U.S. 86, 95 (1958) (plurality opinion). For example, the penal effect of a statute imposing the penalty of imprisonment on convicted bank robbers would not be altered by labeling it a regulation of banks. *Id.*

170. *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992) ("[P]otentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world.").

171. *See, e.g.*, *People v. Adams*, 581 N.E. 2d 637, 641 (Ill. 1991) ("The existence of a 'stigma' requires that . . . the registrant's past transgressions be conveyed to the general public.").

172. *LA. CODE CRIM. PROC. ANN. art. 895* (West Supp. 1994); *LA. REV. STAT. ANN. § 15:574.4* (West Supp. 1994).

173. *LA. CODE CRIM. PROC. ANN. art. 895* (West Supp. 1994); *LA. REV. STAT. ANN. § 15:574.4* (West Supp. 1994). Judges in other states have imposed similar probation conditions absent express statutory authority. *See State v. Bateman*, 771 P.2d 314 (Or. Ct. App. 1989), *review denied*, 777 P.2d 410 (Or. 1989). *See also Molester Sign Violates Rights, ICLU Claims*, *supra* note 86. Some commentators have argued that such conditions amount to judicial legislation and are improper if imposed in the absence of express statutory authorization. *See* Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357 (1989); Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759 (1989).

174. *State v. Babin*, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994).

175. *LA. CODE CRIM. PROC. ANN. art. 895* (West Supp. 1994).

area schools with information concerning his crime and release. Citing *State v. Payne*,<sup>176</sup> the court struck the notification requirement as applied to the defendant.<sup>177</sup> Implicit in its holding was the conclusion that such conditions were punitive.

Parole and probation have traditionally been considered acts of grace allowing offenders to avoid punishment as long as they adhere to certain conditions.<sup>178</sup> Under this approach, a probationer or parolee who finds the conditions of release to be too tough may elect to take the traditional sentence.<sup>179</sup>

Most states, either by statute<sup>180</sup> or judicial decision,<sup>181</sup> specify that rehabilitation is one of the goals to be served by imposing probation conditions. Virtually no statutes describe the goals of parole conditions; the few that include stated goals generally focus on some aspect of rehabilitation.<sup>182</sup> Protection of the public is also considered a legitimate goal of parole and probation.<sup>183</sup> Disagreement exists, however, as to whether parole or probation conditions may be used to inflict punishment.<sup>184</sup>

Under a traditional legislative intent test,<sup>185</sup> parole and probation conditions would be considered non-punitive in jurisdictions where the goal is rehabilitation or community

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176. 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

177. *Babin*, 637 So. 2d at 814.

178. COHEN & GOBERT, *supra* note 35, at 161-78.

179. *Id.* The theory of parole as an act of grace ameliorating punishment is no longer valid in states with determinate sentencing structures, where an offender has no choice of accepting or rejecting parole after his statutorily-determined sentence has been served. Over the past 20 years, most jurisdictions have adopted determinate sentencing schemes. *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993). This theory also lacks vitality in the area of probation, where a convicted child molester might be willing to accept almost any condition in order to avoid the physical abuse that invariably awaits such offenders in prison. *See* James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 102 (1987).

180. *See, e.g.*, ARK. CODE. ANN. § 5-4-303(a) (Michie 1993) ("assist the defendant in leading a law-abiding life"); CONN. GEN. STAT. ANN. § 53a-30(a)(12) (West Supp. 1993) (any conditions reasonably related to his rehabilitation); IOWA CODE ANN. § 907.7 (West 1994) ("provide the maximum opportunity for rehabilitation of the defendant"); ME. REV. STAT. ANN. tit. 17-A, §1204-2-m (West 1983) ("reasonably related to . . . rehabilitation"); N.M. STAT. ANN. § 31-20-6(F) (Michie 1994) ("reasonably related to . . . rehabilitation"); OHIO REV. CODE ANN. § 2951.02(c) (Anderson 1993) (rehabilitate offender).

181. *See, e.g.*, *People v. Keller*, 143 Cal. Rptr. 184, 187 (Cal. Ct. App. 1978), *overruled on other grounds sub nom.*, *People v. Welch*, 19 Cal. Rptr. 2d 520, 526 (Cal. 1993); *Hines v. State*, 358 So. 2d 183, 185 (Fla. 1978); *State v. Mummert*, 566 P.2d 1110, 1112 (Idaho 1977).

182. IND. CODE § 11-13-3-4 (1993) (successful reintegration into the community).

183. COHEN & GOBERT, *supra* note 35, at 183. *See also* *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975) (The only permissible probation conditions are those that contribute significantly *both* to the rehabilitation of the convicted person and the protection of the public.) (emphasis added).

184. COHEN & GOBERT, *supra* note 35, at 184. Courts have concluded that while probation conditions may have an incidental punitive effect, punishment may not be the primary purpose. *E.g.*, *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980).

185. *See* *Foscarinis*, *supra* note 103, at 1670-75, for a thorough description of the expressed and inferred legislative intent tests.

protection.<sup>186</sup> However, courts have shown an increased willingness to allow Eighth Amendment challenges if the actual effect of the condition is punitive.<sup>187</sup> States that allow such harsh conditions like those imposed by the Louisiana statute<sup>188</sup> should be prepared to face *ex post facto* and Eighth Amendment challenges.

2. *Ex Post Facto*.—In *Calder v. Bull*, the United States Supreme Court held that the *Ex Post Facto* Clause prohibited “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”<sup>189</sup> The purpose of the Clause is to assure that penal statutes provide “fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”<sup>190</sup> Two elements must be present for a penal law to be *ex post facto*: “it must be retrospective, and it must disadvantage the offender affected by it.”<sup>191</sup> No *ex post facto* violation occurs if the statute merely changes the procedures under which a criminal case is adjudicated as opposed to changing the substantive law.<sup>192</sup>

Several cases have addressed the retrospective application of sex offender registration and community notification. The Louisiana Court of Appeals, finding registration and notification to be punitive, has barred the application of these requirements to defendants

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186. See *supra* notes 180-81 and accompanying text. See also *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945) (dictum):

The conditions of probation are not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for reason that the Constitution applies only to punishment. These conditions of probation are intended to be an amelioration of the punishment prescribed by law for the given offense.

*Id.* at 415.

187. *Sweeney v. United States*, 353 F.2d 10, 11 (7th Cir. 1965) (requirement that alcoholic refrain from drinking held invalid); *Dear Wing Jung v. United States*, 312 F.2d 73, 75-76 (9th Cir. 1962) (requirement that defendant leave the country held invalid); *Maggard v. Moore*, 613 F. Supp. 150, 152 (W.D. Mo. 1985) (parole eligibility constitutes part of punishment); *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986), *review denied*, 496 So. 2d 142 (Fla. 1986) (requiring offender to affix “CONVICTED DUI” bumper sticker on his car heightens the deterrent, and thus the rehabilitative, effect of punishment); *Bienz v. State*, 343 So. 2d 913, 915 (Fla. Dist. Ct. App. 1977) (requiring adult male to wear diapers in public as condition of probation held so harsh as to counteract the concept of rehabilitation). There have been relatively few challenges of probation or parole conditions under state constitutions, even though most state constitutions carry the same guarantees as the federal Constitution. COHEN & GOBERT, *supra* note 35, at 212. Cohen and Gobert attribute this trend to weak state constitutions, a preference for the federal forum, or a tactical decision to employ the federal Constitution so that decisions on point from other jurisdictions can be used more persuasively. COHEN & GOBERT, *supra* note 35, at 212.

188. See *supra* notes 172-77 and accompanying text.

189. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). The clause applies to both the severity and the mode of punishment. See *Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (“[T]he nature or amount of the punishment . . . should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.”).

190. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

191. *Id.* at 29.

192. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990).

who committed their crimes prior to the legislative enactment.<sup>193</sup> Conversely, the high courts of Washington,<sup>194</sup> Arizona,<sup>195</sup> and New Hampshire<sup>196</sup> have held that registration is regulatory, not penal, and thus does not violate the state or federal prohibition against ex post facto laws. Critical to the Arizona and New Hampshire courts' decisions in *Noble* and *Costello*, however, was the fact that the information contained in the registry was not accessible to the general public.<sup>197</sup> Although the challenged Washington statute provided for widespread community notification, the Washington Supreme Court stressed that the law imposed "significant limits" on the information that could be disclosed.<sup>198</sup>

Construing a New Jersey statute similar to the Washington law, however, a federal district court recently held that community notification violated Ex Post Facto Clause of the U.S. Constitution.<sup>199</sup> The court did allow retrospective application of the state's sex offender registration requirement, provided that the information was not disseminated to the public and was only made available to law enforcement agencies.<sup>200</sup>

In light of this reasoning, ex post facto challenges could pose a serious problem to states that open sex offender registries to the public. As of 1991, more than 66,000 sex offenders were serving time in state prisons.<sup>201</sup> If unrestricted public access to registries is found to be punitive, as *Noble*,<sup>202</sup> *Artway*,<sup>203</sup> and other cases<sup>204</sup> have implied, then states would not be able to apply the registration requirement to the thousands of offenders who committed their crimes prior to the legislative enactment. Retroactive application would also be barred in jurisdictions that find the registration requirements, standing alone, to be punitive.<sup>205</sup>

Some community notification statutes also grant immunity to law enforcement officials who release information about specific offenders, regardless of whether the information was obtained from the registry.<sup>206</sup> While not directly "annexed to the

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193. *State v. Babin*, 637 So. 2d 814 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994); *State v. Payne*, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

194. *State v. Ward*, 869 P.2d 1062, 1069 (Wash. 1994). *See also State v. Taylor*, 835 P.2d 245, 249 (Wash. Ct. App. 1992), *review denied*, 877 P.2d 695 (Wash. 1994); *State v. Estavillo*, 848 P.2d 1335, 1337 (Wash. Ct. App. 1993), *review denied*, 859 P.2d 602 (Wash. 1993).

195. *State v. Noble*, 829 P.2d 1217, 1224 (Ariz. 1992).

196. *State v. Costello*, 643 A.2d 531, 533 (N.H. 1994).

197. *Noble*, 829 P.2d at 1224; *Costello*, 643 A.2d at 533.

198. *Ward*, 869 P.2d at 1069-70.

199. *Artway*, 1995 U.S. Dist. LEXIS 2403, at \*92.

200. *Id.*

201. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE PRISON INMATES 4 (1991) (includes sex offenses against women, children, and men).

202. *Noble*, 829 P.2d at 1224 ("[P]otentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world . . . .").

203. *Artway*, 1995 U.S. Dist. LEXIS 2403, at \*92.

204. *See, e.g.*, *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991).

205. *In re Reed*, 663 P.2d 216, 217 (Cal. 1983); *State v. Payne*, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994).

206. 42 U.S.C.A. § 14071 (West 1994); LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

crime,"<sup>207</sup> the effect of this immunity nonetheless makes community notification under this provision vulnerable to *ex post facto* challenges. In *Weaver v. Graham*,<sup>208</sup> the United States Supreme Court held that a change in Florida's "gain time for good conduct" statute was a violation of the Ex Post Facto Clause, regardless of whether it was "in some technical sense part of the sentence."<sup>209</sup> The critical question was whether the statute altered the effective sentence to the offender's disadvantage.<sup>210</sup>

The practical effect of a child molester's sentence will be altered if law enforcement officials are allowed to publicize the offender's criminal history and address upon release. Recognizing that prisons are dangerous places for child molesters,<sup>211</sup> defendants may plea bargain in order to obtain an early release. If the public is notified prior to release, the conditions upon release will likely be very different than those for which they bargained.

As the Supreme Court noted in *Cummings v. Missouri*,<sup>212</sup> the "Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."<sup>213</sup>

3. *Cruel and Unusual Punishment*.—The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>214</sup> This prohibition, which has been applied to the states through the Fourteenth Amendment,<sup>215</sup> circumscribes both the types<sup>216</sup> and severity<sup>217</sup> of punishment that may be imposed by the legislature<sup>218</sup> for crimes. Reviewing courts should grant substantial deference to the legislature's broad authority, but no penalty is *per se* unconstitutional.<sup>219</sup>

Judicial review of penal statutes is complicated by the failure of the courts to develop a single definition of "cruel and unusual."<sup>220</sup> The United States Supreme Court recognized that the phrase is not static, but must "draw its meaning from the evolving standards of

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207. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). *See also Weaver v. Graham*, 403 U.S. 24, 31 (1981).

208. 450 U.S. 24 (1981).

209. *Id.* at 32.

210. *Id.* at 34. The Court noted that such provisions play an integral role in whether a defendant opts to plea bargain. *Id.* at 32. *See supra* text accompanying note 191.

211. Robertson, *supra* note 179.

212. 471 U.S. 277, 325 (1866).

213. *Id.* at 325.

214. U.S. CONST. amend. VIII.

215. *Robinson v. California*, 370 U.S. 660, 675 (1962).

216. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (Eighth Amendment imposes parallel limitations on bails, fines and other punishments.).

217. *Solem v. Helm*, 463 U.S. 277, 284 (1983).

218. *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2691 (1991). Justice Scalia explains that because there were no common-law crimes in the federal system at the time the Constitution was adopted, the prohibition was meant as a check upon the legislature, not the courts. *Id.*

219. *Solem*, 463 U.S. at 290.

220. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

decency that mark the progress of a maturing society.”<sup>221</sup> In non-capital cases, the Court has generally interpreted the Clause as forbidding either the unnecessary and wanton infliction of pain<sup>222</sup> or sentences that are grossly disproportionate to the crime.<sup>223</sup>

In recent years, state courts have had the opportunity to interpret the federal Clause<sup>224</sup> or similar guarantees in their own state constitutions<sup>225</sup> during the course of challenges to sex offender registries. A long line of cases has developed in California, where the high court ruled more than a decade ago that sex offender registration constitutes punishment and is therefore subject to Eighth Amendment scrutiny.<sup>226</sup> A review of these cases lends an analytical framework to potential Eighth Amendment and state constitutional challenges of community notification programs.

In *In re Reed*, the California Supreme Court held that mandatory lifetime registration of a sex offender convicted under the misdemeanor disorderly conduct statute violated the California Constitution’s prohibition against cruel and unusual punishment.<sup>227</sup> Allen Eugene Reed’s offense consisted of exposing himself in a public restroom and masturbating briefly in the presence of an undercover police officer.<sup>228</sup> Reed was steadily employed and had no prior arrest history.<sup>229</sup>

Drawing on the United States Supreme Court’s decision in *Trop v. Dulles*,<sup>230</sup> the California high court adopted the view that, under the state constitution, punishment should be evaluated in light of “evolving standards of decency.”<sup>231</sup> The court went on to say that implicit in this flexible definition “is the notion that punishment may not be grossly disproportionate to the offense.”<sup>232</sup>

The proportionality test employed by the California court involved three inquiries: 1) an examination of the nature of the offense and the offender, with particular regard to the potential danger to society; 2) a comparison of the registration requirement with other

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221. *Id.* at 101.

222. *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, C. J., dissenting). This restriction also includes mental pain. *See Trop*, 356 U.S. at 101-02 (Although denationalization involves no physical mistreatment, it subjects an individual to a fate of ever increasing fear and distress.).

223. *Solem*, 463 U.S. at 284. A requirement of proportionality applies to both the length and the severity of the punishment. *Weems v. United States*, 217 U.S. 349, 371 (1910).

224. *State v. Lammie*, 793 P.2d 134, 139 (Ariz. Ct. App. 1990); *People v. Adams*, 581 N.E.2d 637, 640 (Ill. 1991). In *Lammie*, the Arizona Court of Appeals determined that the registration provision was not cruel and unusual punishment without answering the threshold question of whether it was punishment. 793 P.2d at 383. Two years later, in *State v. Noble*, 829 P.2d 1217, (Ariz. 1992), the state’s high court finally answered the question and held that registration was not punishment. *Id.* at 1221-24. In *Adams*, the Illinois Supreme Court held that the sex offender registration was not punishment, but expressed the view in dicta that if it were punishment, it would not be cruel or unusual. 581 N.E.2d at 641.

225. *Lammie*, 793 P.2d at 139; *In re Reed*, 663 P.2d 216, 218 (Cal. 1983); *Adams*, 581 N.E.2d at 640.

226. *In re Reed*, 663 P.2d 216.

227. *Id.* at 222.

228. *Id.* at 221.

229. *Id.*

230. 356 U.S. 86 (1958) (plurality opinion).

231. *Id.* at 101.

232. *In re Reed*, 663 P.2d at 220.

penalties imposed in the same jurisdiction for more serious crimes; and 3) a comparison of the registration requirement with other penalties imposed for the same offense in other jurisdictions.<sup>233</sup> As applied to *Reed*, the registration requirement was found to be disproportionate in all three areas and thus constitutionally prohibited.<sup>234</sup>

While *Reed* has set the stage for subsequent challenges to California's sex offender registry, the case has proven to be an anomaly. To date, only misdemeanants convicted of indecent exposure have been successful in avoiding the registration requirement through a cruel and unusual challenge.<sup>235</sup>

The test used by California courts is similar to the three-prong proportionality analysis developed by the United States Supreme Court in *Solem v. Helm*.<sup>236</sup> In *Solem*, the respondent was convicted in a South Dakota state court of issuing a "no account" check for \$100.<sup>237</sup> Although the maximum punishment for the crime was five years imprisonment and a \$5000 fine, the respondent was sentenced to life imprisonment without possibility of parole under the state's recidivist statute because of his six prior convictions for non-violent felonies.<sup>238</sup>

In overturning the sentence, the Court held five to four<sup>239</sup> that "as a matter of principle[,] . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."<sup>240</sup> However, the Court noted that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare."<sup>241</sup>

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233. *Id.* at 220. The test was first articulated in *In re Lynch*, 503 P.2d. 921, 931 (Cal. 1972), and had been previously used by the California Court of Appeals to uphold the registration requirement against a challenge by an offender found guilty of lewd and lascivious conduct toward a child under the age of 14. *People v. Mills*, 146 Cal. Rptr. 411 (Cal. Ct. App. 1978).

234. The court noted that *Reed* did not pose a threat to society, that California did not require registration for other sex-related misdemeanors, and that only five states required sex offenders to register. *In re Reed*, 663 P.2d at 221, 222.

235. *See, e.g., In re DeBeque*, 260 Cal. Rptr. 441, 445 (Cal. Ct. App. 1989); *People v. Monroe*, 215 Cal. Rptr. 51, 58 (Cal. Ct. App. 1985). The court noted in both cases that deference is paid to legislation designed to protect children and that requiring the defendants to register did not shock the conscience nor offend fundamental notions of human dignity. *In re DeBeque*, 260 Cal. Rptr. at 448; *Monroe*, 215 Cal. Rptr. at 58.

236. 463 U.S. 277 (1983). The Court held that the criteria to be used in proportionality analysis included: 1) the gravity of the offense and the harshness of the penalty; 2) other sentences imposed in the same jurisdiction; and 3) sentences imposed for the same crime in different jurisdictions. *Id.* at 292. While the Court did not explicitly require the analysis to include the potential danger to society, this element has been factored in with the gravity of the offense prong. *See, e.g., Harmelin v. Michigan*, 111 S. Ct. 2680, 2706 (1991) (Kennedy, J., concurring) (life sentence without parole for possessing 672 ounces of cocaine not grossly disproportionate because the crime threatens grave harm to society).

237. 463 U.S. at 281.

238. *Id.* at 282.

239. Justice Powell delivered the opinion of the Court in which Justice Brennan, Justice Marshall, Justice Blackmun and Justice Stevens joined. Chief Justice Burger filed a dissenting opinion, joined by Justice White, Justice Rehnquist, and Justice O'Connor.

240. *Solem*, 463 U.S. at 290.

241. *Id.* at 289-90 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

In light of the Court's 1991 decision in *Harmelin v. Michigan*,<sup>242</sup> proportionality challenges under the Eighth Amendment may never succeed. In *Harmelin*, a badly fractured Court upheld a controversial life sentence without parole for Ronald Harmelin, a 45-year-old Michigan man convicted of possessing 672 grams of cocaine.<sup>243</sup> Five justices agreed that a court, when imposing punishment, need not consider mitigating factors unless it is a death penalty case.<sup>244</sup> Justice Scalia, in an opinion joined by Chief Justice Rehnquist, concluded that the Cruel and Unusual Clause was aimed at particular modes of punishment, and does not include a guarantee of proportionality in sentencing.<sup>245</sup> Justice Kennedy, joined by Justice O'Connor and Justice Souter, recognized a narrow proportionality guarantee but interpreted *Solem* as "best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review."<sup>246</sup> Instead, the threshold test is whether the sentence is grossly disproportionate to the gravity of the offense.<sup>247</sup> According to Justice Kennedy, intra- and inter-jurisdictional analysis is appropriate only to validate a rare initial inference of gross disproportionality.<sup>248</sup>

While *Harmelin* may have called the validity of a federal proportionality guarantee into question,<sup>249</sup> a number of state constitutions contain express guarantees that punishment must be proportionate to the crime.<sup>250</sup> Other states have long held that their constitution's "cruel and unusual clause" includes a proportionality guarantee.<sup>251</sup> The majority of state courts that have assessed the validity of *Solem* in the wake of *Harmelin*, however, have adopted Justice Kennedy's narrow standard in interpreting both state and federal constitutional guarantees.<sup>252</sup>

Under the tighter *Harmelin* standard, a child molester would face an uphill battle to convince a court that community notification is cruel and unusual punishment. Requiring a convicted child molester to sign up with a public registry, place a notice in the newspaper, or mail postcards to his new neighbors is not nearly as onerous as the constitutionally valid sentence of life imprisonment for the "victimless" crime of cocaine possession. Employing *Solem*'s intra- and inter-jurisdictional analysis, an offender might

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242. 111 S. Ct. 2680.

243. *Id.*

244. Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Scalia, and Justice Souter.

245. *Harmelin*, 111 S. Ct. at 2685-86 (Scalia, J., concurring).

246. *Id.* at 2707.

247. *Id.*

248. *Id.*

249. E.g., *People v. Knott*, 586 N.E.2d 479, 497 (Ill. App. Ct. 1991) (stating that *Solem* was expressly overruled in *Harmelin*), vacated as moot, 621 N.E.2d 611 (Ill. 1993); *State v. Tyler*, 840 P.2d 413, 434 (Kan. 1992) (holding that the Eighth Amendment contains no proportionality guarantee).

250. IND. CONST., art. I, § 16; ME. CONST., art. I, § 9; NEB. CONST., art. 1, § 15; N.H. CONST., Part I, art. 18; OR. CONST., art. I, § 16; W. VA. CONST., art. III, § 5.

251. *State v. Bartlett*, 830 P.2d 823, 832 (Ariz. 1992), *cert. denied*, 113 S. Ct. 511 (1992); *State v. Brown*, 825 P.2d 482, 491 (Idaho 1992); *People v. Bullock*, 485 N.W.2d 866, 873-74 (Mich. 1992), *reh'g denied*, 486 N.W.2d 744 (Mich. 1992); *State v. Harris*, 844 S.W.2d 601, 603 (Tenn. 1992).

252. *Bartlett*, 830 P.2d at 826; *Brown*, 825 P.2d at 491; *Harris*, 844 S.W.2d at 603. *Contra Bullock*, 485 N.W.2d at 874 (holding that *Solem* is the appropriate standard in interpreting Michigan constitution).

have prevailed by showing the "unusualness" of the community notification requirement.<sup>253</sup> By shifting *Solem* so that the threshold inquiry is the gravity of the offense, however, *Harmelin* forces offenders to prove that child molesting is less serious than drug possession before they can point out that their state is only one of a handful which require them to announce their arrival in the community.

An offender could argue that proportionality analysis is inapplicable because community notification is a mode of punishment, not a term of years.<sup>254</sup> In reviewing modes of punishment, the United States Supreme Court has generally looked to "evolving standards of decency."<sup>255</sup> These standards are not gauged by public opinion polls,<sup>256</sup> but are instead measured by what the Court has called the most reliable indicator of national consensus—the pattern of enacted laws.<sup>257</sup>

By mid-1994, the pattern of enacted laws in the United States gave no clear indication as to whether a convicted child molester's criminal history background should be released to the general public. The majority of state statutes creating sex offender registries call for the data to be private, with some imposing penalties on officials who release the information.<sup>258</sup> A growing number of state laws and a new federal statute, however, allow for varying degrees of community notification.<sup>259</sup> A convicted child molester could build an argument around the pattern of laws that limited release of information; however, the offender would bear the burden of showing a consensus<sup>260</sup> and substantial deference would be granted to the legislature's judgment.<sup>261</sup>

4. *Are "Scarlet Letter" Conditions Invalid under Stated Goals of Probation and Parole?*—Not only may parole and probation conditions be overturned if they violate the Constitution, they are also vulnerable to challenge if they serve no acceptable goal of

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253. See *In re Reed*, 663 P.2d 216, 222 (Cal. 1983) (disproportionality indicated by fact that only a handful of states required registration). But see *State v. Lammie*, 793 P.2d 134 (Ariz. Ct. App. 1990):

Assuming arguendo that no other state required lifetime registration for sex offenses, this alone would not be sufficient to make the law unconstitutional. To hold otherwise would make it virtually impossible for a state to be on the leading edge in passing laws increasing punishment for criminal offenses. Such a holding would require simultaneous passage of similar laws in more than one state.

This would be improbable.

*Id.* at 140.

254. See *supra* note 224 and accompanying text; however, a requirement of proportionality has been held to apply to both the length and the severity of the punishment. *Weems v. United States*, 217 U.S. 349, 372-73 (1910).

255. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

256. *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989).

257. *Id.* at 373. In *Stanford*, the Court held that although 27 of the 37 states allowing capital punishment declined to impose it on persons under the age of 18, this did not establish the degree of national consensus sufficient to label such executions cruel and unusual. *Id.* at 370-71.

258. See *supra* notes 38-40 and accompanying text.

259. See *supra* notes 38-40 and accompanying text.

260. *Stanford*, 492 U.S. at 373.

261. *Id.* at 369-70 (citing *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)).

parole or probation.<sup>262</sup> Thus, defining the goals in a particular jurisdiction is critical in determining whether scarlet letter conditions will stand.

In *State v. Carey*,<sup>263</sup> a poorly educated mother of seven earning \$528 per month was ordered by the trial court to pay fifty dollars per week in restitution as a condition of her probation. The Louisiana Supreme Court struck the condition, holding that in Louisiana, the "purpose of probation is to promote the defendant's rehabilitation by allowing . . . her to reintegrate into society without confinement."<sup>264</sup> Probation "holds no promise and serves no purpose if the conditions are so harsh that the probationer is destined for failure at the outset."<sup>265</sup>

The purpose of Louisiana's "scarlet letter" conditions is not to reintegrate, but to segregate the offender from at least that portion of society which is under the age of eighteen. The practical effect, however, may be to segregate the offender from society as a whole. Since the state of Washington enacted its discretionary community notification policy in 1990, some offenders have been driven from their jobs and communities, harassed by vigilantes, and forced to flee to large cities or other states where they are not known.<sup>266</sup> Such a result is even more probable in Louisiana, where the concept of community notification has been expanded to require *all* released child molesters to mail postcards and place advertisements.

While many people would respond, "Who cares what happens to child molesters?," the fact is that ostracization and its ensuing problems might increase the chance of re-offense.<sup>267</sup> The risk is exacerbated among a certain type of child molester who victimizes primarily during periods of high stress.<sup>268</sup> Because Louisiana's "scarlet letter" conditions apply across-the-board, these factors cannot be taken into consideration. Such offenders might be "destined for failure," which would violate Louisiana's goal of probation as stated in *Carey*.<sup>269</sup>

Courts should recognize that no matter what the stated goal, the practical effect of Louisiana's "scarlet letter" probation and parole conditions is punishment.<sup>270</sup> While

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.262. COHEN & GOBERT, *supra* note 35, at 342.

.263. 392 So. 2d 443 (La. 1981) (per curiam).

.264. *Id.* at 444.

.265. *Id.*

.266. See *supra* notes 31-33 and accompanying text.

.267. Fuller, *supra* note 14, at 603. Predisposing factors include stress, dysfunctional home situations, familial violence, substance abuse, interpersonal deficits, failure of the incest taboo, anti-social mores, and distorted beliefs. Fuller, *supra* note 14, at 603.

.268. L.M. Lothstein, *Can a Sexually Addicted Priest Return to Ministry after Treatment? Psychological Issues and Possible Forensic Solutions*, 34 CATH. LAW. 89 (1991). Two types of pedophiles have been recognized: fixated and regressed. Fixated pedophiles "have a primary sexual interest in children or teens and rarely, if ever, engage in sex with age-appropriate peers." Regressed pedophiles are described as "individuals with a primary sexual orientation toward age-appropriate adults of the opposite sex who *under conditions of extreme stress* may psychologically regress and episodically engage in sex with children." *Id.* at 101 (emphasis added).

.269. 392 So. 2d at 444.

.270. COHEN & GOBERT, *supra* note 35, at 184-85. Cohen and Gobert argue that instead of deeming harsh conditions to be "rehabilitative," courts should recognize that punishment, like rehabilitation, can be a valid

Louisiana's "scarlet letter" conditions arguably violate state probation policy, such conditions could be upheld in jurisdictions where punishment is an accepted goal.

### B. Due Process

When convicted child rapist Joseph Gallardo was discharged from prison in July 1993, local law enforcement officials in Washington state did more than simply release his name and conviction data to the public. They also circulated a flyer describing him as "an extremely dangerous sex offender with a high probability for re-offense."<sup>271</sup>

The issue of whether such allegations of future criminal behavior implicate liberty or property interests protected under the Fourteenth Amendment Due Process Clause was addressed by the United States Supreme Court in *Paul v. Davis*.<sup>272</sup> *Paul* involved a flyer distributed to 800 merchants in Louisville, Kentucky featuring the names and mug shots of persons arrested for shoplifting.<sup>273</sup> Entitled "Active Shoplifters,"<sup>274</sup> the flyer had been prepared and distributed by area police to alert local merchants to possible shoplifters who might be operating during the Christmas season.<sup>275</sup>

One of the featured "Active Shoplifters," Edward Davis, had previously been arrested for shoplifting; however, the charges were dismissed shortly after the flyer was distributed. Davis then brought an action under 42 U.S.C. section 1983,<sup>276</sup> charging that the flyer deprived him of his constitutional rights.<sup>277</sup>

The Court disagreed, holding that Davis's interest in reputation alone was not the type of liberty or property interest sufficient to invoke the procedural guarantees contained in the Fourteenth Amendment Due Process Clause.<sup>278</sup> In previous "stigma" cases where the Court granted relief, a right or status recognized by state law was distinctly altered or extinguished.<sup>279</sup> The applicable state law did not extend any legal guarantee to present enjoyment of reputation.<sup>280</sup> According to the Court, if Davis's view prevailed, arrested persons would have a cognizable claim under section 1983 if law enforcement officials merely proclaimed a belief that the alleged offenders were guilty.<sup>281</sup>

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rationale for imposing parole and probation conditions.

271. See *supra* note 7 and accompanying text.

272. *Paul v. Davis*, 424 U.S. 693 (1976).

273. *Id.* at 695.

274. *Id.*

275. *Id.* at 694-95.

276. 42 U.S.C. § 1983 (1988). The statute reads in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

*Id.*

277. *Paul*, 424 U.S. at 696.

278. *Id.* at 712.

279. *Id.* at 711. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (holding that the state-granted right to purchase liquor cannot be taken away without due process).

280. *Paul*, 424 U.S. at 711.

281. *Id.* at 698.

Under the Court's holding in *Paul*, convicted child molesters who are stigmatized as the result of information distributed by law enforcement officials would be unable to bring a section 1983 action. Relief would be unavailable even if the charges were dismissed or if the person were acquitted. The Court did note that imputing criminal behavior to an individual is considered defamatory *per se* in the courts of virtually every state.<sup>282</sup> Because Washington law grants immunity to law enforcement officials who release "relevant and necessary" information in good faith and without gross negligence, however, Gallardo would not have a cognizable defamation claim against the police who distributed the flyers.<sup>283</sup>

### C. Privacy Implications

The law of privacy provides another potential basis for challenging community notification provisions.<sup>284</sup> The "right to be let alone" is grounded both in the common law<sup>285</sup> and in state and federal constitutional jurisprudence.<sup>286</sup> Because decisions regarding a federal Constitutional right to privacy have hinged on the Fourth Amendment's protection against warrantless searches and seizures and the Fourteenth Amendment's implicit guarantee of fundamental decision privacy,<sup>287</sup> and state

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282. *Id.* at 697.

283. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994). Private groups who distribute flyers imputing future criminal behavior could still be liable under the common law tort of defamation. To address this potential liability, the Washington Association of Sheriffs and Police Chiefs has proposed that the Community Protection Act be amended to extend immunity to news media, schools, and church and youth groups. Memorandum from the WASPC Committee on Sex Offenders (on file with the author) [hereinafter "Memorandum"].

284. See *State v. Payne*, 633 So. 2d 701 (La. Ct. App. 1993), *cert. denied*, 637 So. 2d 497 (La. 1994). A convicted sex offender challenged Louisiana's community notification statute on both *ex post facto* and privacy bases. Because the court held that the statute, as applied to Payne, was an unconstitutional *ex post facto* law, it did not reach the issue of whether the law was a facially invalid invasion of privacy. *Id.* at 702-03.

285. A common-law right to privacy was first advocated by Samuel Warren and Louis Brandeis, who argued in an influential 1890 article that tort law should provide some protection against an increasingly intrusive press. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

286. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992). Gormley posits that over the past century, legal privacy has developed into several interrelated species: tort privacy; Fourth Amendment protection from warrantless search and seizure; fundamental-decision privacy grounded in the Due Process Clause of the Fourteenth Amendment; First Amendment privacy addressing the conflict between one individual's free speech and another's freedom of thought and solitude; and state constitutional privacy.

287. See *Paul v. Davis*, 424 U.S. 693, 712-713 (1976). The Court noted that publicizing the official record of Davis' arrest was not akin to other areas where "zones of privacy" had been recognized. Previous right of privacy cases involved either evidence seized in an unreasonable search or substantive state regulation of matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* For further discussion of *Paul*, see *supra* text accompanying notes 272-283.

constitutional law has generally paralleled this trend,<sup>288</sup> this Note focuses on privacy rights under the common law.

The tort of publication of private facts protects a common law right of privacy that was first advocated by Samuel Warren and Louis Brandeis in an influential 1890 article.<sup>289</sup> Concerned about the advent of "instantaneous photographs," the duo warned that "numerous mechanical devices threaten . . . that 'what is whispered in the closet shall be proclaimed from the house-tops.'"<sup>290</sup> The rapid growth of computerized sex offender registries has lent an air of prescience to Warren and Brandeis' words.

The majority of American jurisdictions have recognized the private facts tort.<sup>291</sup> Under the formulation adopted in the *Restatement (Second) of Torts*, one who publicizes private facts about another is liable for invasion of privacy if the publication would be highly offensive to a reasonable person and is not of legitimate public concern.<sup>292</sup> Claims under this tort are usually directed at the news media, because the communication must reach the general public before liability may be imposed.<sup>293</sup> Newspaper and magazine articles, radio and television broadcasts, speeches before large audiences, and widely distributed handbills are the types of media that may invade a plaintiff's privacy under this tort.<sup>294</sup>

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288. While state constitutions may offer greater protection to an individual's right of privacy than the federal Constitution, state constitutional jurisprudence has tended to focus on fundamental decision privacy and search and seizure privacy. *See generally* Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279 (1992). *But see* People v. Hackler, 16 Cal. Rptr.2d 681, 686-87 (Cal. Ct. App. 1993) (Requiring a probationer who stole two 12-packs of beer to wear in public a T-shirt with the words, "I am on felony probation for theft" violated the offender's state constitutional right to privacy because it had only an incidental impact on his future criminality.). This would probably not apply to child molesters; in an earlier case, the same court held that anyone who sexually molests a child has waived any right to privacy. People v. Mills, 146 Cal. Rptr. 411, 417 (Cal. Ct. App. 1978). The implications of the growing body of state constitutional jurisprudence on community notification is beyond the scope of this Note; for a thorough overview of state privacy cases, see Silverstein, *supra* note 107.

289. Warren & Brandeis, *supra* note 285. The right to privacy is protected by four separate torts: intrusion upon seclusion; appropriation of name or likeness; false light publicity; and publication of private facts. RESTATEMENT (SECOND) OF TORTS § 652A-1 (1977) [hereinafter RESTATEMENT].

290. Warren & Brandeis, *supra* note 285, at 195.

291. Thirty-six states have adopted the publication of private facts tort. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 365-66 (1983). Only four states—Nebraska, New York, Utah and Virginia—have expressly rejected the tort. *Id.* at 366-67.

292. RESTATEMENT, *supra* note 289, § 652D.

293. RESTATEMENT, *supra* note 289, § 652D, cmt. a. Unlike the tort of defamation, where liability may be predicated on a private communication made by the defendant to a third party, the tort of publication of private facts requires a communication that reaches the public at large. To communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons is not an invasion of the right of privacy. RESTATEMENT, *supra* note 289, § 652D, cmt. a.

294. RESTATEMENT, *supra* note 289, § 652D, cmt. a.

By design, computerized sex offender registries provide instant access to a wealth of information that was previously inaccessible or difficult to obtain.<sup>295</sup> In addition to containing conviction data, which is a matter of public record,<sup>296</sup> most registries also include other identifying information such as the offender's current address and place of employment.<sup>297</sup> Four statutory approaches have been used to govern public access to this information. Under one approach, officials who release "relevant and necessary" information contained in the registry are granted immunity from civil liability.<sup>298</sup> Some states open their entire registries to the public;<sup>299</sup> in others, the use of the information is restricted to law enforcement personnel,<sup>300</sup> with some statutes imposing criminal liability for unauthorized release.<sup>301</sup> In a handful of states, release is governed by the applicable Freedom of Information Act (FOIA) or court records statutes.<sup>302</sup>

1. *Government defendants.*—The United States Supreme Court has recognized an individual's privacy interest in his computerized criminal history. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>303</sup> members of the news media sought disclosure under FOIA of an organized crime figure's "rap sheet." Compiled by the Federal Bureau of Investigation, rap sheets contain descriptive information such as the suspect's date of birth, physical characteristics, and history of arrests, charges, convictions and incarcerations. Rap sheets are normally maintained until the subject reaches the age of eighty.<sup>304</sup>

The Court held that rap sheets were categorically exempt from disclosure under section 552(b)(7)(c) of FOIA,<sup>305</sup> which excludes records compiled for law enforcement purposes "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>306</sup> Although most of the information contained in the rap sheet was already a matter of public record, the issue was "whether the compilation of otherwise hard-to-obtain information

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295. As the Court noted in *United States Dep't of Justice v. Reporters Comm.*, "There is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." 489 U.S. 749, 764 (1989).

296. Every court keeps a record of events occurring in that court, including arraignments, adjudications and sentences. As a matter of constitutional right, statute, or court rule, these records are open to public inspection in every state. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUBLIC ACCESS TO CRIMINAL HISTORY RECORD INFORMATION 3 (1988).

297. See sources cited in *supra* note 20.

298. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

299. GA. CODE ANN. § 42-9-44.1 (1994).

300. See sources cited in *supra* note 38.

301. See TEX. REV. CIV. STAT. ANN. art. 6252-13c.1 (West Supp. 1994).

302. See *supra* note 11 and accompanying text.

303. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

304. *Id.* at 752.

305. *Id.* at 777.

306. *Id.* at 755-56 (quoting 5 U.S.C. § 552(b)(7)(C)).

alters the privacy interest implicated by disclosure of that information.”<sup>307</sup> The Court stressed that absent the computerized index, tracking down an offender’s criminal history would require a “diligent search of courthouse files, county archives, and local police stations throughout the country.”<sup>308</sup>

In holding that disclosure was exempt under FOIA, the Court noted that the power of a computerized compilation to affect personal privacy outstrips the combined power of the bits of information it contains.<sup>309</sup> The central purpose of FOIA is to “ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny,” not that information about private citizens that happens to be in the government’s warehouse be disclosed.<sup>310</sup> “[A]s a categorical matter . . . a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy . . . .”<sup>311</sup> Such an invasion is unwarranted when an individual seeks no official information about a government agency, but merely hopes to obtain records that the government happens to be storing.<sup>312</sup>

Under *Reporters Committee*, release of computerized criminal history information to the general public could expose a government entity to liability in those jurisdictions that prohibit release of such information and extend a damage remedy for unauthorized disclosure. While *Reporters Committee* did recognize that offenders have an inherent privacy interest in their computerized criminal history, it is important to note that the Court was discussing personal privacy only as defined by the law enforcement exception of FOIA.<sup>313</sup> Thus, the Court’s holding would not affect those jurisdictions where the statutes expressly provide for public disclosure and the provisions of FOIA are inapplicable.<sup>314</sup>

2. *Media defendants*.—Merely reporting a child molester’s name and conviction data will not subject the media to liability under the private facts tort if this information is already a matter of public record.<sup>315</sup> Under a line of cases developed by the United States Supreme Court, it would also appear that liability may not be imposed on the news media

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307. *Id.* at 764.

308. *Id.*

309. *Id.* at 765.

310. *Id.* at 774 (emphasis in original).

311. *Id.* at 780.

312. *Id.*

313. *Id.* at 762. All states have adopted a version of FOIA. *See Casenote, Administrative Law: Freedom of Information Act*, 62 U. DET. L. REV. 363, 369 (1985).

314. LA. REV. STAT. ANN. § 15:546 (West Supp. 1994); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

315. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (Publishing a rape victim’s name that was obtained from indictments open to public inspection did not state a cause of action for invasion of privacy.). The Court noted that publication of the “contents of public records [is] simply not within the reach of these kinds of privacy actions.” *Id.* at 494. *But see Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 44 (Cal. 1971) (Publishing information about rehabilitated criminal 11 years after plaintiff’s involvement in criminal activity stated a cause of action for invasion of privacy.).

for publishing other information lawfully obtained from a child molester registry, even if the registry is closed to public inspection.<sup>316</sup>

In *The Florida Star v. B.J.F.*,<sup>317</sup> a reporter-trainee obtained a rape victim's name from a report posted in the pressroom at the sheriff's office. The victim won a jury verdict against the newspaper when her name was published in violation of a Florida statute. The Court reversed, holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when *narrowly tailored to a state interest of the highest order.*"<sup>318</sup>

B.J.F.'s attorneys argued that protection of a rape victim's anonymity met the highest interest test. Three related interests were involved: the privacy of the victims of sex offenses; the physical safety of such victims; and the goal of encouraging victims to report sex crimes.<sup>319</sup> While the case did not reach the adequacy of the victim's interest,<sup>320</sup> the Court's treatment suggests that protecting the anonymity of rape victims was not a state interest of the highest order.<sup>321</sup>

Couts could use the *Florida Star* standard to find that protecting the anonymity of child molesters meets the highest interest test, although revealing their names and crimes may implicate their victims, as in the case of incest. News media that lawfully obtain the information may be allowed to publish it with impunity. Even in the states that expressly prohibit public use of the information, the press may not be punished if the information was obtained lawfully, albeit improperly. The United States Supreme Court has recognized as lawful such routine reporting techniques as interviewing sources and monitoring police band radios.<sup>322</sup>

3. *Private defendants.*—In *Florida Star*, the Court noted that in truthful publication cases, individual privacy interests had never prevailed over the media's First Amendment rights.<sup>323</sup> Whether individual privacy interests would prevail in a case involving handbills distributed by community groups depends on the content of the flyers, the timeliness of the crime, and the nature of the remedy, if any, afforded by state law.

Flyers that merely list the offender's criminal history would probably not be considered an invasion of privacy; as the United States Supreme Court has noted, privacy

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316. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Reporters Comm.*, 489 U.S. 749; *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broadcasting Co.*, 420 U.S. 469.

317. 491 U.S. 524.

318. *Id.* at 541 (emphasis added).

319. *Id.* at 537.

320. The Court held that whatever the interest in protecting the anonymity of rape victims, imposing liability on the media did not advance that interest. The Florida statute prohibiting the publication of rape victims' names in an "instrument of mass communication" was facially underinclusive and would not apply to the "backyard gossip who tells 50 people that don't have to know." *Id.* at 540.

321. Commentators have suggested that the Court's holding in *Florida Star* has reduced the utility of the tort of publication of private facts. See Jacqueline R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107. "If a rape victim's name does not compel protection, it is difficult to imagine what type of information will." *Id.* at 1117.

322. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103-04 (1979).

323. *Florida Star*, 491 U.S. at 530.

interests fade once the information has appeared on the public record.<sup>324</sup> Courts in California have carved out an exception and allowed a privacy action to proceed when the crime occurred in the distant past and the offender has been rehabilitated.<sup>325</sup> However, since probationers and parolees have a reduced expectation of privacy,<sup>326</sup> this exception would not apply to them. In states where the registration requirements exceed the term of probation and parole, it is doubtful such an argument would prove persuasive in light of the high recidivism rate among child molesters.<sup>327</sup>

Flyers that include additional information such as an offender's address and place of employment would invoke liability only if the information were highly offensive to a reasonable person and not a matter of legitimate public concern.<sup>328</sup> As interpreted by the Court in *Florida Star*, the public concern test is a threshold inquiry that applies only to the nature of the underlying event.<sup>329</sup> If the underlying event were found to be a matter of public significance, the fact that the information may be offensive is irrelevant.<sup>330</sup>

The commission and investigation of a violent crime which has been reported to authorities is a matter of "paramount public import."<sup>331</sup> The *Florida Star* Court found that inclusion of the rape victim's name was incidental; the "article generally, as opposed to the specific identity contained within it," involved a matter of public significance.<sup>332</sup> Since the purpose of community notification is to publicize an offender's "specific identity," offenders might be able to argue that publication of their name and address is not protected by the Court's holding in *Florida Star*. However, such an argument would not be persuasive in Washington or Louisiana, where the legislature has acknowledged in adopting community notification that "protection of the public from sex offenders is a paramount governmental interest."<sup>333</sup> Further, even if a child molester could show that publication of his name and address was not a matter of public significance, the offender would only be allowed recovery if the information were highly offensive to a reasonable person.<sup>334</sup> A jury would be unlikely to find such information offensive in light of the low public regard for child molesters and the high public concern for children's safety.

#### IV. A WORKABLE LEGISLATIVE APPROACH

In recent years, an Oregon judge who was frustrated with the criminal justice system said, "One time, I thought of dyeing all [child molesters] green and telling children to stay

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324. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975).

325. Conklin v. Sloss, 150 Cal. Rptr. 121, 124 (Cal. Ct. App. 1978); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971).

326. See State v. Malone, 403 So. 2d 1234, 1239 (La. 1981).

327. Reuben A. Lang et al., *Treatment of Incest and Pedophilic Offenders: A Pilot Study*, 6 BEHAV. SCI. & L., 239, 242 (1988).

328. RESTATEMENT, *supra* note 289, § 652D.

329. *Florida Star*, 491 U.S. at 536-37.

330. *Id.*

331. *Id.*

332. *Id.*

333. See *supra* note 29 and accompanying text.

334. RESTATEMENT, *supra* note 289, § 652D.

away from green people."<sup>335</sup> Although the majority of statutes close sex offender registries to the public or limit disclosure to dangerous offenders,<sup>336</sup> there is no doubt that many Americans share the judge's view that all child molesters should be singled out.

The concept of community notification is here to stay. Legislators have two choices: either craft a state-wide approach to community notification, or allow the law to be developed piecemeal by judges who are frustrated with releasing child molesters into the community.<sup>337</sup> The picture is further complicated by the grim fact that states that delay adopting community notification may become safe havens for pedophiles, while states that are too aggressive could exceed the limits of the new federal law and lose federal funding.<sup>338</sup> In addition, the protective value of any community notification program will be illusory at best unless the program can be applied retroactively to offenders who are already in the system.<sup>339</sup>

This Note proposes that state legislatures develop an approach to community notification that is flexible enough to safeguard the community from potentially dangerous offenders while allowing persons with a low risk of reoffense to reintegrate into the community. Such flexibility is desirable in light of the recently approved Violent Crime Control and Law Enforcement Act of 1994,<sup>340</sup> which requires states to develop a child molester registry that meets certain federal mandates. States that fail to comply with the law within three years of its passage will lose ten percent of their funding under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>341</sup> One provision limits community notification to relevant information that is necessary to protect the public from a specific offender.<sup>342</sup>

In some states, community notification consists merely of public access to the sex-offender registry. Members of the general public may go to the sheriff's office and peruse the registry, which includes name, address, and conviction data on all registrants.<sup>343</sup> This form of notification, if continued after the federal law goes into effect, could cost these states a hefty share of their federal crimefighting dollars<sup>344</sup>—a high price tag at a time when the public is clamoring for law and order. In addition, such broad access could

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335. Brilliant, *supra* note 173, at 1366 (alteration in original).

336. See *supra* notes 38-39 and accompanying text.

337. See *supra* note 86 and accompanying text.

338. See *supra* notes 96-97 and accompanying text.

339. See *supra* notes 201-04 and accompanying text.

340. H.R. 3355, 103rd Cong., 2nd Sess. (1994).

341. *Id.* (referring to 42 U.S.C. 3756 (1988)).

342. 42 U.S.C.A. § 14071 (West 1994).

343. See, e.g., GA. CODE ANN. § 42-9-44.1 (1994).

344. States which do not comply would lose 10% of their dollars allocated under 42 U.S.C. § 3756. See 42 U.S.C.A. § 14071 (West 1994). Funding under this section is used to assist states in carrying out programs which improve the criminal justice system, with special emphasis on a nationwide drug control strategy. Eligible programs include multijurisdictional task forces, neighborhood anti-crime programs, anti-terrorism efforts, prison industry, substance abuse rehabilitation, community corrections, and domestic violence programs. 42 U.S.C. §3751 (1988). Indiana receives between \$7 million and \$9 million a year under these so-called Byrne grants. Interview with Catherine O'Connor, Director, Indiana Criminal Justice Institute (Aug. 29, 1994).

also be deemed punitive, which would limit the registration requirement to those offenders who committed their crimes after the law was enacted.

Other states, however, also have notification provisions which operate independently of public access to registry. In Washington, the Department of Corrections directly releases information on ex-offenders it deems to be dangerous, usually several weeks before an offender is required by law to register. Local law enforcement officials then have the discretion to release this information to community groups, the news media, or the general public.<sup>345</sup> Government officials are immune from liability for releasing sex offender information; a proposed amendment would extend this immunity to community groups and the news media, as well.<sup>346</sup>

In Louisiana, all child molesters released on parole or probation are required by law to notify the public through postcards and classified advertisements.<sup>347</sup> The inflexibility of the Louisiana approach lends itself to pragmatic as well as legal problems. The risk of reoffense varies depending on the offender's particular sexual anomaly and whether that offender has received treatment.<sup>348</sup> Incestuous males, for example, seldom repeat their behavior once they have been caught, whereas homosexual pedophiles generally have a recidivism rate of ten percent or higher.<sup>349</sup> Certain types of child molesters have an increased likelihood of recidivism under periods of extreme stress and isolation,<sup>350</sup> which are likely to result soon after the offender's new neighbors receive the postcards. The statute fails to recognize these distinctions and applies the notification requirements across the board, regardless of the risk of reoffense.<sup>351</sup> Deeming the requirements punitive, courts have refused to impose the "scarlet letter" conditions on defendants who committed their crimes prior to the law's effective date.<sup>352</sup>

Washington's approach is much more flexible and, with some modification, presents a good working model for other states to follow as they implement the provisions of the Violent Crime Control and Law Enforcement Act of 1994. The Special Bulletins issued by the state Department of Corrections, combined with the guidelines adopted by local law enforcement agencies, have the potential to recognize each community's unique needs and each child molester's unique risk of reoffense. Because the Louisiana program looks only to the offender's past conduct,<sup>353</sup> it is more likely to be classified as punishment than the Washington plan, which considers current factors such as the community where the offender plans to reside and whether the offender received treatment while incarcerated.

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345. DONNELLY & LIEB, *supra* note 31, at 5. The type of information generally released in Washington includes the offender's approximate or exact address, physical description, photograph, criminal history, method of approaching victims, place of employment, and vehicle model. DONNELLY & LIEB, *supra* note 31, at 5.

346. See Memorandum, *supra* note 283.

347. LA. CODE CRIM. PROC. ANN. art. 895 (West Supp. 1994); LA. REV. STAT. ANN. § 15:574.4 (West Supp. 1994).

348. Lang et al., *supra* note 327, at 253.

349. Lang et al., *supra* note 327, at 253.

350. Lothstein, *supra* note 268.

351. See *supra* note 80 and accompanying text.

352. State v. Babin, 637 So. 2d 814, 824-25 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 649 (La. 1994).

353. See De Veau v. Braisted, 363 U.S. 144, 160 (1960), *reh'g denied*, 364 U.S. 856 (1960).

This built-in flexibility is vital if the program is to be deemed a "regulation of a present situation"<sup>354</sup> and thus exempt from *ex post facto* challenges.

The breadth of the flexibility, however, has raised concerns among some law enforcement officials in Washington who maintain that the WASPC guidelines which classify offenders according to the risk of reoffense are unclear.<sup>355</sup> Another complaint is that the current law vests too much responsibility with local law enforcement agencies to make decisions regarding an offender's risk of reoffense and mental health.<sup>356</sup> However, this broad grant of discretion was designed to ensure that decisions regarding community notification are made by those who live in the community. Several local law enforcement agencies have effectively utilized this discretion to adopt detailed classification schemes that consider such individual factors as substance abuse, therapy, victim preference, and mental health.<sup>357</sup>

If community notification is to operate effectively, there must be a mechanism to enable law enforcement officials to track ex-offenders as they move from town to town. Under the new federal law, verification forms would be mailed every ninety days to offenders deemed "sexually violent predators" and annually to the remainder of the registrants.<sup>358</sup> A more aggressive approach, which was recently enacted in Indiana,<sup>359</sup> allows released child molesters to be placed on extended periods of probation or parole. Judges and the parole board are granted express statutory authority to require, as a condition of release, that offenders participate in a treatment program and avoid all contacts with children that have not been previously approved by the court until the treatment is completed.<sup>360</sup> In addition, offenders are required to register for ten years following their release from prison or placement on parole or probation.<sup>361</sup> Unlike the federal approach, which will limit verification to an annual postcard in the vast majority

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354. *Id.* However, such flexibility did not save New Jersey's "Megan's Law" from being deemed punitive. *See Artway v. Attorney Gen. of New Jersey*, No. 94-6287, 1995 U.S. Dist. LEXIS 2403, at \*92 (D.N.J. Feb. 28, 1995).

355. DONNELLY & LIEB, *supra* note 31, at 8.

356. DONNELLY & LIEB, *supra* note 31, at 8. For other potential problems with this type of notification scheme, *see* Kelly Richmond, *State Defends Megan's Law in Federal Appeals Court*, BERGEN (N.J.) RECORD, Feb. 2, 1995, at A7. In January, 1995, a federal district court judge in Newark issued a preliminary injunction barring community notification in the case of a released rapist. In his ruling, the judge expressed concern that the offender's due process rights could be violated because the law lacks a provision for persons subject to community notification to appeal the risk level assigned to them. *Id.* Under New Jersey's newly enacted community notification statute, prosecutors are responsible for determining an offender's risk level pursuant to guidelines developed by the state attorney general. The statute prescribes three risk levels similar to those followed voluntarily in Washington state and mandates the form of notification which is to be followed for each level. 1994 N.J. Sess. Law Serv. 128 (West).

357. DONNELLY & LIEB, *supra* note 31, at 13-16.

358. 42 U.S.C.A. § 14071 (West 1994).

359. 1994 Ind. Acts 11.

360. *Id.* Persons convicted of sex crimes against children after the measure's effective date could be placed on probation or parole for up to 10 years.

361. S. 363, 109th Leg., 1st Reg. Sess. (Effective July 1, 1995).

of cases, the Indiana approach should boost compliance and enhance tracking by clearing the way for registrants to be under continuous supervision.

Although longer periods of supervision may be more costly to implement, the advantages of such an approach are numerous. In Washington state, one out of five released adult sex offenders fails to register.<sup>362</sup> By linking notification with offenders who are still in the criminal justice system, however, the problems with voluntary compliance will be mitigated. Should the offender relocate, law enforcement officials would be informed and would then be able to decide, based on the needs of the community and the risk of reoffense, whether the public should be notified.

In addition, persons on probation and parole have a reduced expectation of privacy,<sup>363</sup> and thus do not have the same freedom from governmental intrusion as an ordinary citizen.<sup>364</sup> Law enforcement and government officials, immunized by statute, would be able to release relevant and necessary information on offenders with a high risk of reoffense in order to protect the public.<sup>365</sup> At the same time, parole and probation officials, employing the discretion granted under the Indiana law,<sup>366</sup> would be able to tailor conditions of supervision which minimize the risk of reoffense and thus foster rehabilitation.

Almost every person who is behind bars for molesting a child will someday be released from prison. The current patchwork quilt of registration-notification laws has put certain states at risk of becoming a dumping ground for released offenders. A child in Ohio is as vulnerable as a child in Washington. State laws which merely ship child molesters to another part of the country do not really further the goal of public safety.

With the passage of the Violent Crime Control and Law Enforcement Act of 1994, states have a unique opportunity to develop a targeted notification scheme which will protect children throughout the country by ensuring that dangerous offenders are not allowed to slip into anonymity. Because most people do not want a child molester for a neighbor, this protection will always carry the threat of vigilantism. Such threats can be minimized, however, by releasing the relevant information in an accurate, responsible and responsive manner.

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362. *See supra* note 49 and accompanying text.

363. *See supra* text accompanying note 29.

364. *See State v. Malone*, 403 So. 2d 1234, 1239 (La. 1981).

365. WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1994).

366. 1994 Ind. Acts 11.

# THE IMMUNITY OF INTANGIBLE ASSETS FROM A WRIT OF EXECUTION: MUST WE FORGIVE OUR DEBTORS?\*

DOREEN J. GRIDLEY\*\*

## INTRODUCTION

An attorney and her client were diligent and thorough in considering the risks of filing suit against the *ABC* Company (*ABC*). After assessing the net worth of *ABC* to be substantially more than the client's claim against it and weighing the other risks associated with litigation, the client decided to proceed against *ABC*. Now, the end of trial is imminent and it is evident the client will prevail.

Both the client and the attorney are pleased with the probable outcome of the case. The client is particularly anxious to receive the monetary damages it will be awarded as a result of *ABC*'s actions. However, although *ABC*'s net worth is appreciable, *ABC* does not possess sufficient cash to satisfy the judgment, nor does *ABC* possess substantial tangible assets. Instead, *ABC* is a software company whose primary assets are the copyrights to the software products it has developed and licenses. Therefore, additional time and expenditures beyond the issuance of a judgment must be incurred to satisfy the judgment. The attorney asks her client to be patient, but the client's patience is wearing thin—three years have passed since the initial consultation with the attorney on the subject of the litigation.

The client is also confused. Last year, the client lost a lawsuit for a breach of contract action. The client explains that "almost as soon as the gavel came down at the end of the trial," the sheriff came to its facility and seized the company truck, many of the tools used in manufacturing the client's product, and the office computers. The equipment seized was sold a few weeks later, and the proceeds from the sale were used to satisfy the judgment against the client. The client expresses its desire to receive the same kind of expeditious action to acquire its just rewards. The client further comments that significant debt was incurred at a high interest rate to replace the seized equipment and that this trial has already been costly. Addressing the client's valid concerns, the attorney reminds the client that, whether "just" or not, the effect of the applicable law is that satisfaction of the judgment will not occur "as soon as the gavel goes down." Also, the client will incur additional filing costs and attorneys' fees before the judgment is satisfied.

From a client's perspective, the above hypothetical illustrates the problems associated with reaching intangible assets to satisfy a judgment of a monetary award rendered in the client's favor. Absent statutory authority to the contrary, intangible assets,<sup>1</sup> including

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1. An intangible asset is "[p]roperty that is a 'right' such as patent, copyright, trademark, etc., or one which is lacking physical existence, such as goodwill." BLACK'S LAW DICTIONARY 808 (6th ed. 1990).

chooses in action<sup>2</sup> and intellectual property rights associated with a patent, trademark, or copyright, are immune from access by a judgment creditor by a writ of execution to satisfy the judgment.<sup>3</sup> The immunity of intangible assets from a writ of execution does not mean that the judgment creditor is without recourse. Rather, the judgment creditor may reach the judgment debtor's intangible assets through alternative procedures.<sup>4</sup>

Reaching an asset for satisfaction of a judgment by a writ of execution is preferred over the alternatives used to reach intangible assets. In a writ of execution, the assets are seized with relative expediency, and the sale of the assets occurs shortly thereafter. The timeliness of the seizure is particularly important where the asset is of a nature that its value may be easily destroyed or diminished by the judgment debtor. Even though intellectual property rights are subject to such destruction or diminution in value, the seizure of such rights through alternative procedures to the writ of execution does not occur with the expediency desired to protect the judgment creditor's interest in those rights. In addition, the alternatives result in added expense to both parties through discovery, hearings, or other activities.<sup>5</sup> Thus, the judgment creditor's interest in maintaining the value of the judgment debtor's intellectual property assets is heightened by the additional expenses incurred. Also, additional expense to the judgment debtor caused by such proceedings reduces the amount recoverable by the judgment creditor in satisfaction of its judgment. As one author stated, "[s]urely many a victor has emerged from exhausting litigation only to learn from her lawyer that collecting the judgment will cost more than the judgment is worth."<sup>6</sup>

It is probably undisputed that the value of intellectual property rights is greater today than in the past. Consider, for example, the expeditious manner in which newly formed countries such as the Czech Republic and Latvia have joined the Patent Cooperation Treaty.<sup>7</sup> Also, the North American Free Trade Agreement (NAFTA) recognizes and provides for consideration of intellectual property rights.<sup>8</sup> Furthermore, due to various factors such as product development costs, lost profits due to non-enforcement of intellectual property rights, and the global economy, the "assessment, procurement, and protection of intellectual property rights have become a priority for management willing

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2. A "[r]ight of proceeding in a court of law to procure payment of [a] sum of money, or right to recover a personal chattel or a sum of money by action" is a chose in action. *Id.* at 241.

3. For purposes of this Note, a writ of execution is the formal process, usually initiated by a writ or decree at or near the time of judgment, whereby the judgment debtor's non-exempt assets are seized by an officer of the court, such as a sheriff, for subsequent sale in satisfaction of the judgment. *Id.* at 568, 1610.

4. *See infra* subpart I.B.

5. *See infra* subpart I.B.

6. William J. Woodward, Jr., *New Judgment Liens on Personal Property: Does "Efficient" Mean "Better"?*, 27 HARV. J. ON LEGIS. 1 (1990).

7. *Listing of PCT Member Countries*, 1155 T.M.O.G. 34 (Oct. 12, 1993).

8. North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Chapter 17: Intellectual Property, 1992 WL 486274. Articles 1701-1721 of NAFTA constitute the provisions directed toward "protection and enforcement of intellectual property rights" among its member countries. *Id.* Art. 1701. Some even suggest that NAFTA's intellectual property provisions are "a model" for future trade agreements. *Intellectual Property: NAFTA IP Provisions Called 'Model', Industry Concerned by Cultural Exemption*, 9 ITR 1433 (1992).

to confront the realities of competition."<sup>9</sup> A recent estimate provided by the U.S. International Trade Commission indicates that U.S. companies are incurring a loss of \$40 to \$60 billion per year due to violations of intellectual property rights.<sup>10</sup> Consider also that, although cases involving infringement of intellectual property rights are not without cost, the monetary damages awarded in infringement cases may be substantial and, in some instances, "represent significant revenue streams for corporations successful in asserting their . . . [rights] against infringers."<sup>11</sup>

In addition to the perceived increase in value in the rights conferred by grant of a patent, trademark, or copyright, the advent of technology may inherently affect the number of entities whose sole or primary assets are classified as intellectual property. The introduction of the personal computer, for example, created a boom in the number of electronics and software companies.<sup>12</sup> The primary assets of many of these companies are intellectual property rights including the protection of mask works, software copyrights, and electronics and software patents. Today, the primary business of thousands of companies is licensing software products.<sup>13</sup>

The importance of intellectual property rights, as reflected by the increase in value of those rights and the prevalence of the number of companies having solely or primarily intellectual property rights as their assets, seems incongruous with the judgment creditor's inability to seize such assets by a writ of execution for satisfaction of a judgment. Yet, for most causes of action, no statutory provision exists to override the common law immunity of intellectual property from a writ of execution. This antiquated distinction of intellectual property from tangible assets has spurred demands for change.<sup>14</sup> Nevertheless, intellectual property still must be seized by procedures other than a writ of execution in most civil litigation.<sup>15</sup>

As previously stated, the alternative procedures to the writ of execution often result in the consumption of additional time and money for the judgment creditor. Further, if the intellectual property assets of the judgment debtor are not seized with sufficient expediency, the judgment debtor may, in the interim period between the issuance of a judgment against it and the actual seizure of the assets, destroy or diminish the value of its intellectual property assets. Thus, the immunity of intellectual property assets from a writ of execution results in special treatment of intellectual property, which appears to

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9. Daniel F. Perez, *Exploitation and Enforcement of Intellectual Property Rights*, THE COMPUTER LAWYER, 10:8, Aug. 1993, at 10.

10. *Id.*

11. *Id.*

12. See, e.g., Otto Friedrich, *The Computer Moves In*, TIME, Jan. 3., 1983, at 14; Daniel P. Wiener, *Closing Down the Garage of the Little Guy*, U.S. NEWS & WORLD REPORT, Aug. 17, 1987, at 45. See also Peter Huber, *Software's Cash Register*, FORBES, Oct. 18, 1993, at 314.

13. For example, there are over 12,000 companies having a secondary standard industrial classification (SIC) of computer software development. This number does not include some of the major players in the software industry, such as Microsoft Corporation, who are identified instead as a business services organization. DUN & BRADSTREET ELECTRONIC BUSINESS DIRECTORY, Q3/93, Oct. 29, 1993.

14. Cherie L. Lieurance, *Judgment Creditors' Access to Intellectual Property Rights—Is Simple Execution in Sight?*, 7 WHITTIER L. REV. 375 (1985).

15. See *infra* subpart I.A.

protect the judgment debtor and to hinder the judgment creditor from obtaining a lawfully determined judgment. This "special treatment" which benefits the judgment debtor presents a greater risk in satisfying a judgment if the judgment debtor possesses primarily or exclusively intangible assets, such as intellectual property, rather than tangible assets. The increased risk may result in chilling effects in filing suit or in selecting business partners.

A potential plaintiff filing suit against an entity having primarily intangible assets must consider the risk and the additional costs, both time and monetary, for satisfaction of the judgment. The potential plaintiff may possibly be "chilled" from bringing a legitimate cause of action. Further, in view of this risk, business arrangements may be affected. One entity may be less likely to engage in a business relationship with another entity having intellectual property assets as its primary assets. If the engagement is likely to stimulate disagreement between the parties, the first entity would have an incentive to deal with businesses which hold primarily tangible assets. Thus, "chilling" is also implicated in the selection of a business partner.

Not only are the alternative procedures to a writ of execution costly from the judgment creditor's perspective, they are also costly to the judicial system. Judicial economy is compromised by the requirement to engage in proceedings supplemental to the judgment. Additional filings must be received by the court and, in many instances, the court must accommodate a hearing between the parties. Discussion and discovery of the judgment debtor's assets are better considered at the time of judgment to reduce the time and monetary costs to the courts in determining which of the judgment debtor's assets, including intangible assets, are necessary to satisfy the judgment.

The purpose of this Note is to provide practical guidance to a litigator whose client is considering filing an action against an entity possessing primarily or exclusively intangible assets from which a judgment would be satisfied. Part I provides the historical development of the law regarding the use of the judgment debtor's intangible assets to satisfy a judgment. Part II examines some of the jurisdictional differences that impact the satisfaction of the judgment with the judgment debtor's intellectual property assets. Part III discusses the ability to pursue tangible assets associated with intellectual property rights. Finally, Part IV explores equitable measures that may be utilized in conjunction with the alternative procedures to the writ of execution and the risks involved with the use of such procedures.

## I. REACHING THE JUDGMENT DEBTOR'S INTANGIBLE ASSETS

The common law immunity of intangible assets from a writ of execution was firmly established through Supreme Court cases in the 1850s which maintained the English common law view of intangible assets. Over the next century, alternatives to a writ of execution were sanctioned by the courts and made available via statute. This Part examines the development of the law with regard to the appropriate procedure(s) for reaching the judgment debtor's intangible assets to satisfy a judgment.

#### *A. Unavailability of a Writ of Execution*

Two cases decided by the United States Supreme Court in the 1850s stand for the proposition that intangible assets are immune from a writ of execution.<sup>16</sup> Both cases centered on the sale of a copperplate engraving utilized to print a map that was copyrighted.<sup>17</sup> A judgment was obtained against the copyright owner and, to satisfy that judgment, the copperplate engraving was sold in a judicial sale following a writ of execution identifying the plate as an asset.<sup>18</sup> The purchaser of the plate claimed that he obtained the right to print and sell maps made with the plate.<sup>19</sup> The Court in the first case determined that, pursuant to common law, the “incorporeal right, secured by the statute to the author, . . . is not the subject of seizure or sale by means” of a writ of execution.<sup>20</sup> Instead, the owner of the incorporeal right could be compelled to transfer the rights for subsequent sale following a creditor’s bill<sup>21</sup> so long as such a transfer complied with the requirements of the copyright act.<sup>22</sup>

The immunity of intangible assets to a writ of execution was revisited in the second case, *Stevens v. Gladding*.<sup>23</sup> In *Stevens*, the Court considered whether the right to publish the maps passed with the purchase of the copperplate.<sup>24</sup> Although the Court thought it unnecessary to reconsider the issue of the availability of a writ of execution for a copyright, it did offer some additional justification for its holding in *Stephens v. Cady*.<sup>25</sup> The Court added the following to the common law reasoning:

[I]ncorporeal rights do not exist in any particular state or district; they are coextensive with the United States. There is nothing in any act of congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of states and districts.<sup>26</sup>

After all, the United States Constitution granted Congress the power to create patents and copyrights.<sup>27</sup> The Court appeared to be concerned with the logistics of allowing a local

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16. *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852); *Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1854).

17. *Stephens*, 55 U.S. (14 How.) at 528.

18. *Id.*

19. *Id.*

20. *Id.* at 531. Incorporeal rights are “[r]ights to intangibles, such as legal actions, rather than rights to property.” BLACK’S LAW DICTIONARY 767 (6th ed. 1990).

21. A creditor’s bill is an “[e]quitable proceeding brought to enforce payment of debt out of property or other interest of [the] debtor which cannot be reached by ordinary legal process.” BLACK’S LAW DICTIONARY 369 (6th ed. 1990); *see infra* subpart I.B.

22. *Stephens*, 55 U.S. (14 How.) at 531.

23. 58 U.S. (17 How.) 447 (1854).

24. *Id.* at 450.

25. 55 U.S. (14 How.) 528 (1852).

26. 58 U.S. (17 How.) at 451.

27. U.S. CONST. art I, § 8, cl. 8 (granting the power “[t]o promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

court to exercise its powers at law to reach a federally-conferred right, although the Court apparently had less difficulty with the notion that a local court of equity, as through a creditor's bill, may exercise such power.

The Court had previously considered the proper procedure for reaching an equitable interest of a judgment debtor. Specifically, several years prior to the decisions of *Stephens v. Cady* and *Stevens v. Gladding*, the Court considered the availability of a writ of *fieri facias*<sup>28</sup> against an equity of redemption<sup>29</sup> in *Van Ness v. Hyatt*.<sup>30</sup> The Court ruled that the right of the mortgagor to purchase the property in the event of foreclosure was "nothing more than a contract . . . [,] a conditional right to purchase, which, in effect, was nothing more than a *chose in action*."<sup>31</sup> Because choses in action could not be seized via a writ of *fieri facias*, the sale of the equity of redemption was held to be improper.<sup>32</sup> However, the Court stated that the appellant did have standing in a court of equity for redemption.<sup>33</sup>

Although the Court in *Van Ness* decided the issue by using a contract rights analogy, it first discussed the state of the law at that time regarding the availability of a writ of *fieri facias* for reaching an equitable interest.<sup>34</sup> Absent legislation or a judicial holding to the contrary, the law of the United States was generally the same as England's—equitable interests were not subject to levy by a writ of *fieri facias*.<sup>35</sup> The view that intangible assets are immune from a writ of execution and implicitly immune from a writ of *fieri facias* was voiced by the Supreme Court in a later decision.<sup>36</sup>

The apparent general immunity of intangible assets from any judicial sale as set forth in *Stephens v. Cady* and restated in *Stevens v. Gladding* resulted in the ability of a judgment debtor to hide its assets. Succinctly stated by the Indiana Supreme Court in 1866 in *Keightley v. Walls*,<sup>37</sup> "[a] defendant might be worth millions, and yet, if his wealth consisted of choses in action, he could successfully defy his creditors."<sup>38</sup> However, legislators began to seek alternatives to the writ of execution to reach intangible assets, such as choses in action.<sup>39</sup> For example, in *Keightley*, it was stated that, although generally a court in equity may exercise jurisdiction over choses in action of the debtor,

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Discoveries").

28. A writ of *fieri facias* is a "writ directing the sheriff to satisfy a judgment from the debtor's property." BLACK'S LAW DICTIONARY 627 (6th ed. 1990). Originally, only goods and chattels could be seized by a writ of *fieri facias*. *Id.*; *Van Ness v. Hyatt*, 38 U.S. (13 Pet.) 294, 298 (1839).

29. An equity of redemption is a right of a mortgagor to save the mortgaged property from foreclosure "after it has been forfeited, at law, by a breach of the condition of the mortgage (i.e., default in mortgage payments), upon paying the amount of debt, interest and costs." BLACK'S LAW DICTIONARY 541 (6th ed. 1990).

30. 38 U.S. (13 Pet.) at 297-98.

31. *Id.* at 301.

32. *Id.*

33. *Id.*

34. *Id.* at 298-300.

35. *Id.* at 298.

36. *Ager v. Murray*, 105 U.S. 126 (1881); *see infra* text accompanying note 51.

37. 27 Ind. 384 (1866).

38. *Id.* at 386.

39. *Id.*

Indiana does not so permit absent a statute to the contrary.<sup>40</sup> Indiana courts were granted jurisdiction through proceedings supplementary to execution<sup>41</sup> via statute.<sup>42</sup>

### *B. Alternatives to a Writ of Execution*

In 1881, the United States Supreme Court opened the door to alternatives to a writ of execution for reaching the intangible assets of the judgment debtor.<sup>43</sup> The facts of *Ager v. Murray* are similar to the hypothetical posited in the Introduction to this Note. Specifically, a monetary judgment was issued against an individual who owned no real nor personal property in the jurisdiction of the lower court but did own interests in patents which, if sold at a judicial sale, would produce enough money to satisfy the judgment.<sup>44</sup> A writ of *fieri facias* was executed on the judgment, but because the patent owner had no real nor personal assets, the judgment was not satisfied.<sup>45</sup> The patent owner assigned his interest in the patents to his wife and she, in turn, reconveyed all the interest to her husband.<sup>46</sup> The judgment creditor then sought to reach the patent rights of the original patent owner and his wife in satisfaction of the judgment.<sup>47</sup> The Court, in exercising its power of equity, affirmed the order of the lower court that interest in the patents should be sold at a judicial sale to satisfy the judgment, and the patent owner was required to assign his interests to the purchaser.<sup>48</sup> If the patent owner did not voluntarily assign his rights, a court-appointed trustee would execute the assignment.<sup>49</sup>

The Court in *Ager* stated that the rights granted to copyright owners and patent owners "do not exonerate the right and property thereby acquired . . . from liability to be subjected by suitable judicial proceedings to the payment of his debts."<sup>50</sup> To reconcile its holding with the decisions of *Stephens v. Cady* and *Stevens v. Gladding*, the Court emphasized that it was not exercising its powers at law as through a writ of execution, but rather was exercising its equitable powers, which "may be enforced in all cases where the person is within its jurisdiction."<sup>51</sup> Thus, the Court reaffirmed the unavailability of a writ of execution to reach intangible assets of the judgment debtor, absent a statute to the contrary. However, the holding of *Ager* established that a court in equity may seize the intangible assets by other judicial proceedings.

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40. *Id.*

41. Supplementary proceedings, also known as proceedings supplementary or proceedings supplemental, are procedures instituted after an execution that are "directed to the discovery of the debtor's property and its application to the debt for which the execution is issued." BLACK'S LAW DICTIONARY 1439 (6th ed. 1990).

42. *Keightley*, 27 Ind. at 386.

43. *Ager v. Murray*, 105 U.S. (15 Otto) 126 (1881).

44. *Id.* at 127.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 132.

49. *Id.*

50. *Id.* at 128.

51. *Id.* at 129-31.

The law/equity distinction of *Ager* led to the eventual identification of specific alternatives to the writ of execution. Garnishment, creditor's bills, and proceedings supplemental are examples of viable equitable proceedings. Interestingly, a writ of *fieri facias*, a proceeding at law, has also been held a viable alternative, despite the law/equity distinction of *Ager*.<sup>52</sup>

Garnishment is a "proceeding whereby a plaintiff creditor . . . seeks to subject to his or her claim the property or money of a third party . . . owed by such party to defendant debtor, *i.e.*, principal defendant."<sup>53</sup> Choses in action and other intangible assets are subject to garnishment in some jurisdictions.<sup>54</sup> Thus, royalties from intellectual property may be garnished.<sup>55</sup> Intangible assets of the judgment debtor may also be reached by a creditor's bill.<sup>56</sup> Similarly, proceedings supplemental (supplementary proceedings) are used to reach the judgment debtor's intangible assets.<sup>57</sup>

A writ of *fieri facias* has also been utilized for reaching the intellectual property rights of the judgment debtor.<sup>58</sup> Despite the aforementioned holding of *Van Ness* that intangible assets cannot be reached by a writ of *fieri facias*<sup>59</sup> and without reference thereto, the United States Court of Appeals for the Third Circuit in *McClaskey v. Harbison-Walker Refractories Co.*<sup>60</sup> reversed the finding of the district court which held that a writ of *fieri facias* and a special (statutory) writ of *fieri facias* may not be used to reach the judgment creditor's patent rights.<sup>61</sup> Because the *McClaskey* courts did not consider the *Van Ness* case, the reasoning of these courts is worthy of discussion.

In *McClaskey*, the judgment creditor did not proceed by a bill of equity for satisfaction of the judgment from the judgment debtor's patent rights, but sought to reach the patent rights via a special writ of *fieri facias*.<sup>62</sup> The statutory writ of *fieri facias* provided that the sheriff would seize the patent rights for judicial sale.<sup>63</sup> The district

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52. See *infra* notes 58-61 and accompanying text.

53. BLACK'S LAW DICTIONARY 680 (6th ed. 1990). For purposes of this Note, garnishment is distinguished from attachment. Attachment is a proceeding instituted at the time suit is filed or during trial to seize property intended to be utilized to satisfy the eventual judgment. The order for attachment occurs prior to the issuance of a judgment. *Ager*, 105 U.S. at 126.

54. See, e.g., *Baltimore & Ohio R.R. Co. v. Hostetter*, 240 U.S. 620, 622 (1916); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 203 (1934).

55. See, e.g., *Davis v. Tingley*, 9 A. 32 (Pa. 1877); *Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co.*, 280 F. 753 (1st Cir. 1922).

56. See, e.g., *Ager*, 105 U.S. (15 Otto) 126; *Kenyon v. Automatic Instrument Co.*, 160 F.2d 878, 884 (6th Cir. 1947).

57. See, e.g., *Keightley v. Walls*, 27 Ind. 384, 386 (1866); *Coldren v. American Milling Research & Dev. Inst.*, 378 N.E.2d 870, 872 (Ind. Ct. App. 1978) (holding that patent and contract rights may be reached via proceedings supplemental).

58. *McClaskey v. Harbison-Walker Refractories Co.*, 138 F.2d 493, 497-500 (3rd Cir. 1943).

59. See *supra* text accompanying notes 28-33.

60. 138 F.2d 493 (3rd Cir. 1943).

61. *McClaskey v. Harbison-Walker Refractories Co.*, 46 F. Supp. 937, 938 (W.D. Pa. 1942), *rev'd*, 138 F.2d 493 (3rd Cir. 1943).

62. *Id.* at 937.

63. *Id.* at 938.

court, using *Ager* as authority, opined that the levy of the property by the sheriff through the writ of *fieri facias* was akin to a levy by writ of execution which *Ager* had explicitly deemed unavailable for incorporeal rights.<sup>64</sup> The United States Court of Appeals for the Third Circuit reversed, reasoning that the *effect* of the writ of *fieri facias* was essentially the same as that of a creditor's bill<sup>65</sup> and "that to effect the assignment of a patent it is not necessary to observe a precise formula so long as what is done meets the substance of the requirements of the federal statute."<sup>66</sup>

Both a creditor's bill and a writ of *fieri facias* are invoked by the judgment creditor when the judgment is not satisfied by a writ of execution.<sup>67</sup> Although the judgment creditor in *McClaskey* had the option of proceeding by a creditor's bill, it chose not to.<sup>68</sup> A creditor's bill is an *equitable* proceeding initiated to enforce a judgment.<sup>69</sup> The writ of *fieri facias* is likewise used to enforce a judgment after a writ of execution is unsuccessful. However, as stated in *McClaskey*, it is issued at the request of the judgment creditor.<sup>70</sup> The judgment creditor in *McClaskey* thus referred to the writ of *fieri facias* as "an adequate remedy at law."<sup>71</sup> Therefore, it was probably less difficult and less expensive to achieve the desired result by a writ of *fieri facias* than to complete the equitable proceeding of a creditor's bill.

In *McClaskey*, the circuit court focused on the end result rather than on the means used to achieve that result. The law/equity distinction of *Ager* is applicable to the means of achieving the desired result. The holding of *McClaskey* circumvented the distinction established by the Supreme Court, but the fact that the intangible assets of the judgment debtor cannot be reached until after the judgment is left unsatisfied by a writ of execution remains intact.

*Van Ness*, as previously discussed, stands for the proposition that intangible assets (equitable interests) cannot be reached via a writ of *fieri facias*.<sup>72</sup> In *Van Ness*, the writ of *fieri facias* was referred to throughout the opinion as an "execution."<sup>73</sup> Though the writ of *fieri facias* is issued after judgment,<sup>74</sup> it is a remedy at law akin to a writ of execution.<sup>75</sup> As previously stated, the court in *McClaskey* did not address the holding of *Van Ness*. Although the law/equity distinction of *Van Ness*, *Stephens v. Cady*, *Stevens v. Gladding* and *Ager* may not seem "just" given today's view of intangible assets and in particular today's view of intellectual property, at least the law/equity distinction had a justifiable basis. The inclusion of a writ of *fieri facias* as an alternative proceeding for reaching the

64. *Id.*

65. 138 F.2d at 499.

66. *Id.* at 500. The federal statute referenced, 35 U.S.C. § 47, identifies valid assignments of patents rights.

67. *See supra* notes 21, 28.

68. 46 F. Supp. at 937.

69. *See supra* note 21.

70. 46 F. Supp. at 938.

71. 138 F.2d at 498 n.7.

72. *See supra* text accompanying note 32.

73. *Van Ness v. Hyatt*, 38 U.S. (13 Pet.) 294 (1839).

74. The writ of *fieri facias* in *Van Ness* was issued seven months after judgment. *Id.* at 297.

75. BLACK'S LAW DICTIONARY 627 (6th ed. 1990).

intangible assets of the judgment debtor makes the law more difficult to accept as "just" because the judgment creditor must wait to seize the assets for judicial sale, even though no such waiting period exists for reaching tangible assets.<sup>76</sup>

As previously mentioned, intangible assets may be immediately available for seizure if statutory authority so provides.<sup>77</sup> Thus, in some civil causes of action, the judgment creditor's interests in the judgment debtor's intangible assets are protected with relative expediency. Bankruptcy proceedings, for example, have provided for seizure of intangible assets for some time.<sup>78</sup> Because immediate seizure of intangible assets is the exception rather than the rule, the judgment creditor's interest in the judgment debtor's intangible assets is afforded different levels of protection depending on the particular cause of action. This cause-of-action dependency, coupled with the jurisdictional differences discussed below, makes the law as applied to intangible assets in general even less consistent and more difficult to justify.

## II. JURISDICTIONAL DIFFERENCES/DEPENDENCIES

Whether suit is filed in state or federal court generally has no impact on the alternatives to the writ of execution utilized to levy the judgment debtor's intangible assets for judicial sale to satisfy the judgment. Rule 69 of the Federal Rules of Civil Procedure states, in pertinent part:

The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.<sup>79</sup>

Therefore, for most causes of action, other than those brought under and act promulgated by the federal government, such as the Bankruptcy Act, state law prevails. Consequently, in preparation for bringing suit, the litigator must become familiar with the applicable state law and properly assess jurisdictional differences if an action may be brought in more than one state. Some issues of concern are: (1) the types of property which

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76. Since *McClaskey*, there has been a split among the states as to whether a writ of *fieri facias* may be used as an alternative to the writ of execution for reaching the judgment debtor's intangible assets. The Delaware Supreme Court, for example, stated that the seizure of equitable interests in stock certificates by a writ of sequestration was closer to sequestration in equity rather than a writ of attachment *fieri facias* and therefore was permissible. *Greene v. Johnston*, 99 A.2d 627, 636 (Del. 1953); compare *Burchett v. Roncari* wherein the Connecticut Supreme Court held that choses in action may not be seized by a writ of *fieri facias*. 434 A.2d 941, 942 (Conn. 1980). The court in *Burchett* pointed out that the writs of *fieri facias* and *scire facias* are the ancient writs of execution. *Id.*

77. *Ager v. Murray*, 105 U.S. (15 Otto) 126, 129 (1881).

78. In *Ager*, the Court noted that in bankruptcy proceedings in England, a patent right may be required to be assigned for payment of debts to creditors even though not so stated in the statute. *Id.* at 128. In the United States, the Bankruptcy Act specifically included intangible assets as property to be assigned and sold to pay the bankrupt party's creditors. *Id.* at 129.

79. FED. R. CIV. P. 69.

constitute intangible assets; (2) the procedural alternatives available to reach intangible assets in satisfaction of the judgment; (3) the point in time at which a lien is levied on the intangible asset by such procedures; and, (4) precautionary measures required by law to protect the judgment creditor's interest in the judgment debtor's intangible assets. Each of these issues is presented below.

#### *A. What Constitutes an Intangible Asset?*

In determining whether to file suit, a litigator and her client generally consider, as a practical matter, the probability of success in the action. One factor is the ability of the potential adverse party to satisfy the judgment. Hence, an assessment of the potential adverse party's worth is an early consideration. It is also advisable, especially in view of the "special treatment" of intangible assets discussed herein, that the nature of the entity's assets be determined. Moreover, different jurisdictions may define intangible assets differently, and each jurisdiction's definition may be dynamic.

Consider, for example, the holding of *Rowe v. Colpoys*,<sup>80</sup> which modified the common law rule that licenses were not considered "goods and chattels" and, therefore, were not available for levy by a writ of *fieri facias*.<sup>81</sup> The court pointed out that the requirement that "equitable and incorporeal interests were required to be reached by proceedings in equity" had been tempered by the then-recent adoption of the Federal Rules of Civil Procedure, which dispensed with the distinction between courts of law and courts of equity.<sup>82</sup> Considering that no law to the contrary existed in the District of Columbia, the court found no justification for "preserving disparate categories of property, or of rights or interests in property, out of which to satisfy judgments"<sup>83</sup> and held that transferable licenses, such as the license to sell alcoholic beverages, are subject to levy by a writ of *fieri facias* in the District of Columbia.<sup>84</sup>

The definitions of intangible assets among jurisdictions are too numerous for complete exposé in this Note. A few additional examples may be helpful, however. In Illinois, a seat or membership on the Chicago Mercantile Exchange was not subject to execution because it was an intangible asset, not a "good or chattel."<sup>85</sup> In *Utica National Bank & Trust Co. v. Marney*,<sup>86</sup> oil and gas leasehold interests were deemed intangible personal property in Kansas.<sup>87</sup> The court in *Bedingfield v. McLarty*<sup>88</sup> held that hunting and

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80. 137 F.2d 249 (D.C.Cir. 1943), *cert. denied*, 320 U.S. 783 (1943).

81. *Id.* at 250-51.

82. *Id.* at 250.

83. *Id.* at 251.

84. *Id.* Note that *McClaskey* and *Rowe* (*see supra* notes 58-71, 80-83 and accompanying text) were decided in the same year and that both involved the use of a writ of *fieri facias* to seize intangible assets in satisfaction of the judgment. The court in *McClaskey* circumvented the law/equity distinction for intangible assets, while the court in *Rowe* directly addressed the law/equity distinction. *McClaskey* used the end result to justify its holding and did not change the definition of an intangible asset. *Rowe* broadened the definition of property subject to the writ.

85. *Rochford v. Laser*, 414 N.E.2d 1096, 1102 (Ill. App. Ct. 1980).

86. 661 P.2d 1246 (Kan. 1983).

87. *Id.* at 1248.

88. 324 S.E.2d 312 (S.C. 1984).

fishing rights are both intangible assets and also personal property under South Carolina law.<sup>89</sup> An unsecured, unliquidated counterclaim was found to be a chose in action in *In re Great Lakes Steel & Fabricating Industries, Inc.*<sup>90</sup> A vested interest in certificates of deposit is an intangible asset subject to Ohio's garnishment procedures.<sup>91</sup> Similarly, a depositor's interest in her bank deposits was found to be property of nature subject to garnishment or attachment but not subject to a writ of execution under Arkansas law.<sup>92</sup>

Perhaps the only properties universally deemed intangible assets are the rights conferred by grant of a patent, trademark, or copyright. The very definition of intangible assets enumerates these rights.<sup>93</sup> For other property, the litigator should consult the applicable state law, recognizing that the issue of whether or not an asset is intangible may be defined by cases having causes of action that differ from those being considered by the litigator. The litigator must also be conscious of the type of asset (intangible, tangible, goods and chattels, etc.) encompassed within the specific statutes authorizing an alternative procedure to the writ of execution for application to intangible assets.

### *B. What Alternatives May be Utilized?*

The types of procedures available as an alternative to the writ of execution for reaching the intangible assets of the judgment debtor and the specific requirements for such procedures vary among the states. The alternative procedures for a few states are examined in this Note for illustrative purposes.

In Indiana, intangible assets may only be reached by procedures established by statute.<sup>94</sup> The Indiana General Assembly has provided such a mechanism for reaching intangible assets in its proceedings supplementary to execution.<sup>95</sup> Indiana does not recognize a bill in equity for reaching those assets.<sup>96</sup>

One of Indiana's neighbors, Illinois, recognized two procedural alternatives to the writ of execution. Specifically, the judgment creditor could file a creditor's bill<sup>97</sup> or could institute proceedings to discover the assets of the judgment debtor.<sup>98</sup> Today, both procedures have been combined into Illinois' supplementary proceedings.<sup>99</sup>

Under New York law, several procedures are provided for enforcement of money judgments.<sup>100</sup> Included are a delivery or "turn-over" order,<sup>101</sup> an installment payment

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89. *Id.* at 312-13.

90. 83 B.R. 1015, 1022 (Bankr. N.D. Ind. 1988).

91. *Park v. Park*, 541 N.E.2d 640, 641 (Ohio Civ. Div. 1988).

92. *In re Frazier*, 136 B.R. 199, 202 (Bankr. W.D. Ark. 1991).

93. *See supra* note 1.

94. *Keightley v. Walls*, 27 Ind. 384, 386 (1866); *Coldren v. American Milling Research & Dev. Inst.*, 378 N.E.2d 870, 872 (Ind. Ct. App. 1978).

95. IND. CODE ANN. § 34-1-44-2 (West 1993).

96. *Coldren*, 378 N.E.2d at 872.

97. *Rochford v. Laser*, 414 N.E.2d 1096, 1102 (Ill. App. Ct. 1980).

98. *Id.*; *Asher v. United States*, 436 F. Supp. 22, 25 (N.D. Ill. 1976), *aff'd*, 570 F.2d 682 (7th Cir. 1978).

99. ILL. ANN. STAT. ch. 735, para. 5/2-1402 (Smith-Hurd 1993); ILL. ANN. STAT. S. CT. R. 277 (Smith-Hurd 1993).

100. N.Y. CIV. PRAC. L. & R. 5201-5251 (McKinney 1993).

101. *Id.* § 5225.

order,<sup>102</sup> and appointment of a receiver.<sup>103</sup> Other states, such as California, also permit appointment of a receiver to satisfy the judgment.<sup>104</sup>

Garnishment has been used to reach a vested interest in a certificate of deposit in Ohio<sup>105</sup> and Arkansas.<sup>106</sup> As already discussed, the District of Columbia and Pennsylvania have permitted the seizure of intangible assets by a writ of *fieri facias*.<sup>107</sup>

Thus, the litigator must consult statutory and decisional authority to determine what types of procedures are available to reach the judgment debtor's intangible assets. Obviously, the requirements for such a procedure will impact the cost of reaching the assets as well as the time required between issuance of a judgment and the actual seizure of the assets. If the adverse party is likely to refuse to comply with the judgment, time may be a very important consideration. Also, the cost of the procedure is frequently an issue with the client.

### *C. When is a Lien Levied Against the Asset?*

An important consequence of the specific alternative procedure used in lieu of a writ of execution is the time at which a lien is imposed on the asset. Because the imposition of a lien on an asset establishes the judgment creditor's "claim, encumbrance, or charge on property for payment of some debt, obligation or duty,"<sup>108</sup> the time the lien attaches indicates the level of protection for the judgment creditor's interest in the judgment debtor's assets.

The time at which a lien attaches varies among the states and may depend on the type of property levied. In Indiana, for example, for property reachable by a writ of execution, a lien attaches to that property upon the issuance of an execution.<sup>109</sup> A lien is not secured at that time against property immune from a writ of execution.<sup>110</sup> Unfortunately, in *Coldren v. American Milling Research & Development Institute*, a commonly cited case on the issue, the question of when a lien is secured for intangible assets via proceedings supplementary was rendered moot and not addressed.<sup>111</sup>

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102. *Id.* § 5226.

103. *Id.* § 5228.

104. CAL. CIV. PROC. CODE § 564 (West 1993). California specifically excludes some types of property, including choses in action, from a writ of execution. *Id.* § 699.720. However, intellectual property rights are not enumerated as immune. Nevertheless, the annotations of § 695.010, entitled Property Subject to Enforcement Generally, cite an 1896 case that deems patents as immune from a writ of execution. Intellectual property rights are therefore presumably immune from a writ of execution in California.

105. *Park v. Park*, 541 N.E.2d 640, 641 (Ohio Civ. Div. 1988).

106. *In re Frazier*, 136 B.R. 199, 202 (Bankr. W.D. Ark. 1991).

107. *Rowe v. Colpoys*, 137 F.2d 249, 251 (D.C. Cir. 1943); *McClaskey v. Harbison-Walker Refractories*, 138 F.2d 493, 497-500 (3rd Cir. 1943); *see supra* note 84.

108. BLACK'S LAW DICTIONARY 922 (6th ed. 1990).

109. IND. CODE ANN. § 34-1-34-9 (West 1994); *Coldren v. American Milling Research & Dev. Inst.*, 378 N.E.2d 870, 871 (Ind. Ct. App. 1978).

110. *Coldren*, 378 N.E.2d at 871.

111. *Id.* at 872.

In Illinois, a lien is secured against real property upon recordation of judgment,<sup>112</sup> against personal property when a writ of execution is delivered to the sheriff,<sup>113</sup> and, for intangible assets not leviable by a writ of execution, at the "time a writ of execution is delivered to the sheriff, and not at the commencement of the citation to discover assets proceeding."<sup>114</sup> As stated by the United States Court of Appeals for the Seventh Circuit, "if a lien is given upon tangible personal property by delivery of the writ to the sheriff, a different method of exercising the right of sale should not prevent the similar creation of a lien on intangible property."<sup>115</sup>

A judgment creditor would prefer the *Asher* court's view over that of Indiana because it affords the judgment creditor with some protection prior to the commencement or conclusion of an alternative proceeding. However, time limits to the lien resulting from a writ of execution exist. In Illinois, such a lien is only enforceable for ninety days.<sup>116</sup> Also, if no writ of execution is issued, initiation of the alternative proceeding alone does not result in the imposition of a lien on the tangible or intangible assets sought to satisfy the judgment.<sup>117</sup> When using a citation to discover assets, a lien is not secured until the court orders the delivery of the assets.<sup>118</sup>

In New York, a lien attaches to personal property reachable by a writ of execution at the time the writ is delivered to the sheriff.<sup>119</sup> For real property subject to a writ of execution, the imposition of the lien is dependent upon the docketing of the writ.<sup>120</sup> For supplementary proceedings used to satisfy the judgment, a lien is imposed at the time the order is secured.<sup>121</sup> In a few states, such as California, the judgment creditor may request the imposition of a nonpossessory judgment lien at the time judgment is issued.<sup>122</sup>

These examples illustrate the differences among jurisdictions as to the time at which a lien is imposed on intangible assets. As shown by the state of the law in Illinois, in addition to jurisdictional variations, different assets may be treated differently, even when the same procedure is used to reach the asset. The litigator must, therefore, be cognizant of any special precautionary measures necessary to protect the client's interests.

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112. ILL. ANN. STAT. ch. 735, para. 5/12-101 (Smith-Hurd 1993).

113. *Id.* para. 5/12-111.

114. *Asher v. United States*, 436 F. Supp. 22, 25 (N.D. Ill. 1976), *aff'd*, 570 F.2d 682, 684 (7th Cir. 1978). For purposes of this Note, citation to discover assets is akin to a creditor's bill.

115. *Asher*, 570 F.2d at 684.

116. ILL. ANN. STAT. ch. 735, para. 5/12-110 (lien on real property); *see also* *Rochford v. Laser*, 414 N.E.2d 1096, 1103 (Ill. App. Ct. 1980) (liens on intangible assets may expire).

117. *Rochford v. Laser*, 414 N.E.2d 1096, 1101-04 (Ill. App. Ct. 1980); *Barnett v. Stern*, 93 B.R. 962, 976 n.5 (Bankr. N.D. Ill. 1988), *rev'd on other grounds*, 909 F.2d 973 (7th Cir. 1990).

118. *Rochford*, 414 N.E.2d at 1104; *Barnett*, 93 B.R. at 976 n.5.

119. *Knapp v. McFarland*, 462 F.2d 935, 938 (2nd Cir. 1972).

120. N.Y. CIV. PRAC. L. & R. § 5203 (McKinney 1994).

121. *Id.* § 5202(b).

122. CAL. CIV. PROC. CODE §§ 697.550, 697.570 and 697.530; *see also* *infra* notes 214-20 and accompanying text.

#### *D. Must the Judgment Creditor Take Precautionary Measures?*

Differences among the states exist in the type of assets that constitute intangible assets, the alternative procedures available for reaching intangible assets, and the level of protection afforded the judgment creditor before or during such proceedings through the imposition of a lien on the intangible assets of the judgment debtor. There appears, however, to be little, if any, discrepancy in identifying intellectual property (namely, patents, trademarks, and copyrights) as intangible assets, perhaps due to decisions in the early cases such as *Stephens v. Cady*, *Stevens v. Gladding*, and *Ager v. Murray*.<sup>123</sup> Whatever the reason, the rights conferred by the grant of patents, federal trademarks, and copyrights are at least classified as intangibles. Why, then, are these rights treated differently among the states?

The procedures used and the protection afforded the judgment creditor are variable. Hence, the judgment debtor—the patent owner, the trademark owner, and the copyright owner—is also afforded different levels of protection among the states. If, as stated in *Stevens v. Gladding*, “these incorporeal rights do not exist in any particular State or district; [and] they are coextensive with the United States,”<sup>124</sup> should not the owner be accorded the same rights in every state for the forcible stripping of the owner’s federally-granted rights? Without federal guidance, the litigator is free, when an action may be brought in more than one state, to select a forum to gain any advantage she may legally obtain for her client. Further, the United States has set forth procedures for enjoining and stripping the owner’s rights in infringement actions—both during trial and at judgment<sup>125</sup>—and for bankruptcy proceedings.<sup>126</sup> Though not every cause of action has a federal counterpart, it seems logical that the United States has an interest in the transfer by the courts of the rights it grants in intellectual property.

The court’s jurisdiction over the intellectual property rights of the judgment debtor may also be an obstacle to reaching the assets. If a court does not have jurisdiction over the owner of a federally-conferred intellectual property right, the court has no jurisdiction over the right.<sup>127</sup> For example, in the case of *Independent Film Distributors v. Chesapeake Industries*, the court was asked to consider whether, under New York state law, a lien was imposed on a British company’s copyrighted plays when movie reels of the plays were sold at a judicial sale.<sup>128</sup> The sale followed a default judgment against the British company and its U.S. distributor after the distributor failed to pay a film laboratory for the processing of negatives and the manufacturing of prints.<sup>129</sup> Although the New York court had jurisdiction over the tangible objects, *i.e.*, the movie reels, the court held it had no jurisdiction over the British company’s copyrights because it had no jurisdiction

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123. *Stephens v. Cady*, 55 U.S. (14 How.) 528 (1852); *Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1854); *Ager v. Murray*, 105 U.S. (15 Otto) 126 (1881); *see supra* subparts I.A., I.B.

124. *Stevens*, 58 U.S. at 451.

125. *See infra* notes 182-91 and accompanying text.

126. *See supra* note 78.

127. *Independent Film Distrib. v. Chesapeake Indus.*, 148 F. Supp. 611, 614 (S.D.N.Y. 1957), *rev’d*, 250 F.2d 857 (2d Cir. 1958) (The Second Circuit questioned the imposition of the lien under the New York statute.).

128. *Id.* at 614.

129. *Id.* at 613.

over the British company. Therefore, no lien could be levied on the copyrights.<sup>130</sup> Although no issue of jurisdiction arises if the judgment debtor is the owner of intellectual property rights to be used to satisfy the judgment, the court is without jurisdiction if the judgment debtor's intellectual property rights are contractually granted by an owner not within the court's jurisdiction. Therefore, the litigator must be cautious to bring the action in the proper forum if the intangible assets anticipated to be used to satisfy the judgment are granted by a third party. For patents, trademarks, and copyrights, the appropriate public records should be consulted. For other intangible assets, such a determination may be difficult due to the absence of an accessible record.

The imposition of a lien on intangible assets is a concern not only to the judgment creditor trying to reach those assets. Knowledge of any lien on intangible assets is also important to the purchaser of such assets at a judicial sale. The purchaser should be apprised of all claims or encumbrances on the property purchased.

Property to be sold at judicial sale may be encumbered. Consider, for example, the case of *Kenyon v. Automatic Instrument Co.*,<sup>131</sup> where an inventor had assigned the rights to his patent to a company while reserving a right to royalty payments from the sale of each machine covered by the patent.<sup>132</sup> The patent was sold at a judicial sale conducted by a court-appointed receiver.<sup>133</sup> The court held that the inventor's right to royalty payments passed with the sale of the patent from the original assignee to another company through the receiver.<sup>134</sup>

In the bankruptcy action of *In re Spitzel*, title to pens held in inventory by the party in bankruptcy passed to the bankruptcy trustee.<sup>135</sup> The bankrupt party was under a license from the manufacturer of the pens, and the license contained conditions regarding the sale of the pens.<sup>136</sup> The court held that the trustee was bound by the terms of the license in selling the pens to satisfy the debts of the bankrupt party.<sup>137</sup>

These cases represent the types of encumbrances that may be associated with intangible and tangible assets. Although the judgment creditor in these cases was not prevented from reaching the assets, the purchasers were hurt by the encumbrances. Thus, let the buyer beware.

### III. REACHING THE TANGIBLE ASSETS ASSOCIATED WITH INTELLECTUAL PROPERTY RIGHTS

Intellectual property may be different in at least one respect from other types of intangible assets. Unlike the typical chose in action, contract right, or license, intellectual property rights are often coupled with tangible assets. For example, patent rights may be embodied in a machine or chemical composition. The legal rights of intellectual property

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130. *Id.* at 614.

131. 160 F.2d 878 (6th Cir. 1947).

132. *Id.* at 880, 883.

133. *Id.* at 883.

134. *Id.* at 884.

135. *In re Spitzel*, 168 F. 156, 156 (E.D.N.Y. 1909).

136. *Id.*

137. *Id.* at 156-57.

are independent from that of the tangible property associated therewith: "Intellectual property rights do not encompass rights to any tangible property embodying or derived from such rights and, conversely, rights to tangible property do not include intellectual property rights associated with that property."<sup>138</sup> Thus, the immunity of intellectual property does not, as discussed below, apply to the tangible property associated with the intellectual property rights.

#### *A. Tangible Assets Associated with Copyright*

A copyrighted work is usually distributed on tangible media such as paper, audio or video tape, computer diskette, or compact disc. In addition, a tangible object may be used to duplicate the copyrighted material for subsequent sale. Recall that a copperplate engraving used to print a copyrighted map was the subject of litigation in *Stephens v. Cady* and *Stevens v. Gladding*.<sup>139</sup>

In *Stephens v. Cady*, the Court held that the engraving could be sold via a writ of execution, but the copyright could not.<sup>140</sup> In *Stevens v. Gladding*, the Court held that the exclusive right to print and publish the map granted by copyright did not attach to the engraving and, thus, was not sold nor transferred to the owner of the engraving.<sup>141</sup> The Court stated that "there is no necessary connection between [the plate and the copyright]. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of each other."<sup>142</sup> Although the plate was sold at a judicial sale for the benefit of the judgment creditor, the purchaser ended up with a plate, which only had value as scrap until the copyright to the map expired. In fact, the purchaser could have suffered additional loss because he had duplicated and sold copyrighted material, *i.e.*, maps made with the plate, but a jury found the purchaser not guilty of infringement.<sup>143</sup> Again, let the buyer beware.<sup>144</sup>

More recent cases have also recognized the distinction between copyright and associated tangible objects: master disks used to reproduce records are separate from the copyright of the recording;<sup>145</sup> materials used to furnish a copyrighted map puzzle are separate from the copyright thereon;<sup>146</sup> and motion picture negatives for copyrighted movies are tangible objects independent of the copyright.<sup>147</sup> While the tangible objects

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138. Thomas L. Bahrick, *Security Interests in Intellectual Property*, 15 AM. INTELL. PROP. L. ASS'N Q.J. 30, 32 (1987).

139. *See supra* notes 17-24 and accompanying text.

140. *Stephens v. Cady*, 55 U.S. (14 How.) 528, 531 (1852).

141. *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 453 (1854).

142. *Id.* at 452.

143. *Stevens v. Gladding*, 60 U.S. (19 How.) 64, 65 (1856).

144. *See also Knickerbocker Toy Co. v. Winterbrook Corp.*, 554 F. Supp. 1309, 1324 (D.N.H. 1982) (The purchase of a copyright pattern for Raggedy Ann and Andy dolls does not result in the transfer of the copyright to the purchaser.).

145. *Capitol Records, Inc. v. Mercury Record Corp.*, 109 F. Supp. 330, 333, 338-339 (S.D.N.Y. 1952), *aff'd*, 221 F.2d 657 (2d Cir. 1955).

146. *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 854 (2d Cir. 1963).

147. *Walt Disney Prod. v. United States*, 327 F. Supp. 189, 192 (C.D. Calif. 1971), *modified on other grounds*, 480 F.2d 66 (9th Cir. 1973), *cert. denied*, 415 U.S. 934 (1974).

associated with copyright may be seized for judicial sale by a writ of execution, a purchaser of those tangible objects should understand that it does not necessarily receive the copyright associated with those objects as a result of the acquisition.<sup>148</sup>

### *B. Tangible Assets Associated with Patent Rights*

Tangible objects that are the subject of a patent may be created. In *Wilder v. Kent*,<sup>149</sup> two patented machines were sold by a judicial sale held subsequent to the issuance of a writ of execution.<sup>150</sup> The patent owner claimed that, pursuant to *Stephens v. Cady* and *Stevens v. Gladding* (copyright cases), the purchase did not result in a grant of right to the purchaser to use the patented machines.<sup>151</sup> The court held that although the purchaser did not acquire a right in the patents by purchasing the machines, “[b]y implication he is invested with a license to use that particular machine.”<sup>152</sup> As a practical matter, the court recognized that the tangible property had no value unless a license to use the property passed to the purchaser.<sup>153</sup> This holding seems inconsistent with *Stephens v. Cady* and *Stevens v. Gladding* where the purchasers also ended up with tangible objects having no value because no rights passed with them.

On the other hand, the sale of the patented machine in *Wilder* is probably more akin to the acquisition of copyrighted materials, such as copies of the map in *Stephens v. Cady* and *Stevens v. Gladding*. Sales occurring subsequent to a writ of execution do not violate the owner’s copyright.<sup>154</sup> However, copyrights do not encompass an exclusive right to use as do patents.<sup>155</sup> Further, if an entity holds a patent to a process for which an unpatented machine is developed to execute and that machine is sold after a writ of execution, there appears to be conflict as to whether the purchaser of the machine acquires a license to use the patented process pursuant to *Wilder* or whether the tangible object used to execute the process is useless without a license from the patent owner to use the process pursuant to *Stephens v. Cady* and *Stevens v. Gladding*. In addition, if an entity holds a design patent and the molds used to manufacture the patented design are sold, does the purchaser obtain a license to manufacture the design by acquiring the molds or are the molds useless to the purchaser unless the purchaser obtains a license to manufacture the patented design?

Pursuant to 35 U.S.C. § 154, the patentee of a machine or composition is granted “the right to exclude others from making, using or selling the invention throughout the United

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148. The distinction of copyright and the material objects embodying the work is now codified in 17 U.S.C. § 202 (1988).

149. *Wilder v. Kent*, 15 F. 217 (C.C.W.D. Pa. 1883).

150. *Id.* at 217-18.

151. *Id.* at 219.

152. *Id.*

153. *Id.*

154. See *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 854-55 (2d Cir. 1963) (Sale of a copyrighted object at a judicial sale does not mean that the purchaser infringed the copyright.); see also 17 U.S.C. § 109 (1988) (Generally, the lawful owner of a copy of the copyrighted work is free to “sell or otherwise dispose” of the copy possessed.).

155. See 17 U.S.C. §§ 106-120 (rights conferred in copyrighted works) and 35 U.S.C. § 154 (rights conferred to patentees).

States. . . ."<sup>156</sup> For a patented process, the patentee is granted "the right to exclude others from using or selling throughout the United States, or importing into the United States, products made by that process. . . ."<sup>157</sup> Patentees of design patents are granted the same rights to exclude as are granted for machine or composition patents.<sup>158</sup> Thus, with regard to use of the invention, the rights conferred for machine and composition patents, process patents, and design patents are essentially identical.

Some distinction does exist regarding the type of tangible objects that are associated with the various types of patents. In all instances, a product that embodies the invention may be made. A patented machine, a product made using a patented process, and a patented object for which a design patent exists embody inventions for which the patentee has exclusive rights. Pursuant to *Wilder*, a court would likely permit the purchaser of these embodiments to use them without violating the patent owner's rights.

Process patents and design patents may be associated with another type of tangible object—an object used to execute the process or to duplicate the invention. For process patents, a machine or series of machines may be needed to execute the process. For design patents, molds may be used to duplicate products embodying the patented design. These tangible objects are akin to the copperplate of *Stephens v. Cady* and *Stevens v. Gladding*. A court would not likely imply a license to use the patented process or to duplicate the patented design by acquisition of the aforementioned tangible objects. To imply a license would result in granting the purchaser the intellectual property rights of the judgment debtor for as long as the tangible object is able to execute the process or to duplicate the design. The foregoing discussion reveals that, in actions that implicate the intellectual property rights of patent owners, the ability to acquire valuable tangible assets varies according to the type of tangible object possessed by the judgment debtor.

### C. Tangible Assets Associated with Trademarks

Trademarks are also associated with tangible objects. A trademark is presented on goods or on media such as tags and labels, signs, product brochures, and the like. More importantly, a "trademark is a form of property which exists in connection with the goodwill or tangible assets of a business."<sup>159</sup> A trademark may be transferred in connection with the goodwill of a business without transferring the tangible assets of the business.<sup>160</sup> Thus, a trademark and its associated tangible assets are independent from each other. However, a trademark is not independent from the intangible asset of goodwill because a trademark may not be transferred without the transfer of the business

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156. 35 U.S.C. § 154 (1988).

157. *Id.*

158. *Id.* § 171 (1988).

159. *Adams Apple Distrib. Co. v. Papeleras Reunidas, S.A.*, 773 F.2d 925, 931 (7th Cir. 1985) (citations omitted). For purposes of this Note, goodwill is an intangible asset representing the value of the business in excess of the value of the business's assets. Goodwill is reflected in factors such as the business's location, reputation and employees. *BLACK'S LAW DICTIONARY* 694-95 (6th ed. 1990).

160. *Adams Apple Distrib. Co.*, 773 F.2d at 931 (citing *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 676 (7th Cir. 1982)).

or goodwill.<sup>161</sup> Therefore, although a trademark may be sold by an involuntary judicial sale,<sup>162</sup> it cannot be sold without the accompanying sale of the goodwill.<sup>163</sup>

#### *D. Are the Inconsistencies Justifiable?*

Because tangible assets associated with intellectual property rights are independent from the intellectual property, those tangible assets may be sold pursuant to a writ of execution. However, the value of those tangible assets may be insignificant in many instances. The law regarding the sale of the tangible assets associated with intellectual property inconsistently values the tangible objects associated with patent rights. Thus, the likelihood of deriving financial benefit from the sale of these tangible objects depends on the type of intellectual property owned by the judgment debtor. It also depends on the status of the judgment debtor's business. If, for example, the judgment debtor owns a patent for machines and has several of those machines in its inventory, the judgment creditor will be permitted to expediently satisfy a portion of its judgment upon the judicial sale of the machines following a writ of execution. If the judgment debtor has no such machines, the judgment creditor's only recourse is a procedural alternative to the writ of execution for the subsequent judicial sale of the patent. Similarly, satisfaction of a judgment from a software company possessing as its primary assets the copyright in its software products must be attained through alternative procedures. Finally, because a trademark cannot be conveyed with the judicial sale of the business, a purchaser must be found to buy both the business and the trademarks.

These differences may impact a business's contractual decisions. A savvy business person may be more inclined to enter into business arrangements with a patent owner engaged in making and selling its patented machine or composition than with a software company because the business person has a greater likelihood of obtaining money damages from the patent owner. Further, the savvy business person would consider how legal remedies are affected by the type of intellectual property assets owned by the potential opposing party.

### IV. EQUITABLE MEASURES TO PROTECT THE JUDGMENT CREDITOR'S INTEREST

Sir Edward Coke (1552-1634) said, "Reason is the life of the law, nay the common law itself is nothing else but reason . . . . The law, which is perfection of reason."<sup>164</sup> The immunity of intellectual property and other intangible assets from levy by a writ of execution seems to be without reason or, at the very least, founded on imperfect reasoning. Accepting Sir Edward Coke's view of the law, the law relating to the judicial sale of intangible assets is similarly unreasonable.

This Note has discussed practical matters for consideration by the litigator prior to the filing of a cause of action against an entity possessing intangible assets to be used to

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161. *Id.*; Jacobs, Bell & Baumol v. Curtis, 556 A.2d 817, 818 (N.J. 1989).

162. *Adams Apple Distrib. Co.*, 773 F.2d at 931.

163. *Jacobs, Bell & Baumol*, 556 A.2d at 818.

164. THE OXFORD DICTIONARY OF QUOTATIONS 148 (2d ed. 1955) (quoting from INSTITUTES: COMMENTARY UPON LITTLETON, FIRST INSTITUTE, § 138).

satisfy a judgment. The litigator should be aware of jurisdictional differences, including property classified as an intangible asset; the procedures used to reach intangible assets; and, the time at which a lien attaches to the intangible assets. Also, the ability to reach the tangible assets associated with intellectual properties should be considered. This section of the Note focuses on what, if any, interim equitable relief may be available to protect the judgment creditor's interest in the judgment debtor's intangible assets until they are seized.

#### *A. General Equity Principles*

Initially, a law/equity distinction served as the basis for the immunity of intangible assets from levy via a writ of execution.<sup>165</sup> Now, the law permits the use of procedures at law, such as a writ of *fieri facias*. However, the judgment creditor must still wait before the intangible assets can be seized. Thus, an inequity between tangible and intangible remains. Because equity is “[j]ustice administered according to fairness . . . [and] denotes the spirit and habit of fairness, justness and right dealing,”<sup>166</sup> litigators may consider equitable measures to protect the judgment creditor's interest in the judgment debtor's intangible assets during the time delay.

Equity is not without bounds, however. For example, “[i]nadequate damage and irreparable injury are not synonymous.”<sup>167</sup> Nonetheless, we are not concerned with the inadequacy of a remedy for a particular cause of action; rather, the focus is on providing the judgment creditor with protection when using the alternative procedures.

Equity also does not, absent a statute to the contrary,<sup>168</sup> authorize a court “to seize, or otherwise provisionally impound, assets for application upon a money demand that is not secured by a lien on such assets and has not been reduced to judgment.”<sup>169</sup> Thus, equitable measures prior to judgment are generally impermissible;<sup>170</sup> this rule of law applies to both tangible and intangible assets.

Although no action may be taken prior to a judgment, common law has provided for an actionable wrong if a judgment debtor fraudulently transfers its assets to avoid satisfaction of the judgment.<sup>171</sup> However, if a debtor disposes of its assets, the judgment creditor may be without recourse in satisfying the judgment even though the wrong is

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165. See *supra* subpart I.B.

166. BLACK'S LAW DICTIONARY 540 (6th ed. 1990).

167. *Jador Serv. Co. v. Werbel*, 53 A.2d 182, 186 (N.J. 1947).

168. See *infra* subpart IV.B.

169. W.W. Allen, *Jurisdiction of Equity to Sequester, Seize, Enjoin Transfer of, or Otherwise Provisionally Secure Assets for Application Upon a Money Demand Which Has Not Been Reduced to Judgment*, 116 A.L.R. 270, 271 (1938). See also *Alder v. Fenton*, 65 U.S. (24 How.) 407, 411 (1860) (defendants permitted to dispose of their property after commencement of suit against them because plaintiff had no legal right to such property).

170. The lower Pennsylvania courts in the 1890s recognized “cautionary judgments.” *Allen, supra* note 169, at 296. If plaintiff suspected that the defendant might take action that would diminish plaintiff's ability to recover money damages, plaintiff could seek a pre-judgment cautionary judgment, which usually required defendant to pay money to the plaintiff. *Id.* at 296-97. Pennsylvania courts later dispensed with the cautionary judgment and adopted the law of other jurisdictions. *Id.* at 297.

171. *Kane v. Sesac*, 54 F. Supp 853, 862 (S.D.N.Y. 1943).

actionable. Nevertheless, the belief that such disposition is "wrong" may justify the use of equitable measures to protect the judgment creditor's interests.

Standing in opposition to the judgment creditor's desire to protect its interest in the intangible assets of the judgment debtor is the right of the judgment debtor to constitutional procedural due process.<sup>172</sup> The constitutionality of a prejudgment garnishment proceeding was challenged in *Sniadach v. Family Finance Corp. of Bay View*.<sup>173</sup> The procedure was instituted at the request of an attorney<sup>174</sup> prior to obtaining a judgment against the debtor.<sup>175</sup> The Wisconsin procedure was found unconstitutional because no notice nor opportunity to be heard was provided to the wage earner prior to the garnishment of her wages.<sup>176</sup>

In another case, the Supreme Court upheld the constitutionality of a writ of sequestration available to a holder of a mortgage or lien.<sup>177</sup> As in *Sniadach*, the procedure at issue was in a prejudgment *ex parte* seizure, but differed from the *Sniadach* procedure in many respects, including the nature of the interest at stake with greater due process concern given to the wage earner of *Sniadach*.<sup>178</sup> Thus, prejudgment procedures may or may not satisfy procedural due process requirements depending upon the particular procedure implemented.

Many of the due process concerns may be dissipated by actions employed after judgments. However, property is an interest protected by the Due Process Clause; therefore, any equitable measures employed to protect creditor's intangible assets must comply with the requirements of the Due Process Clause.<sup>179</sup>

Generally, a court exercising its equitable powers is afforded discretion. Although the complaint itself may identify specific relief, if the specific relief is unavailable, a court of equity may grant other relief as appropriate.<sup>180</sup> A court of equity may even grant monetary relief if the remedy at law is uncertain, incomplete, or insufficient.<sup>181</sup>

It is under these general guidelines that equitable measures utilized in conjunction with alternative procedures to a writ of execution are explored. No *ex parte* prejudgment proceeding is proposed in light of the rules presented above. Rather, the equitable powers of a court using recognized procedures are explored.

### *B. Equitable Remedies for Certain Causes of Action*

For some causes of action, specific equitable remedies have been defined by statute. Other causes, such as infringement, are predicated on the violation of the rights associated

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172. U.S. CONST. amend. V (This amendment applies to the states by U.S. CONST. amend. XIV, § 1.).

173. 395 U.S. 337 (1969).

174. *Id.* at 338.

175. *Id.* at 340.

176. *Id.* at 341-42.

177. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619-20 (1974); *see supra* text accompanying notes 173-176.

178. *Mitchell*, 416 U.S. at 614-19.

179. *See infra* text accompanying note 240.

180. *Filson v. Fountain*, 171 F.2d 999, 1002 (D.C.Cir. 1948), *rev'd on other grounds*, 336 U.S. 681 (1949).

181. *Id.* at 1003.

with intangible assets. Courts address intangible assets in these cases in a well-defined manner. A survey of the manner in which the courts deal with the intangible assets in these cases will allow later consideration of those mechanisms for use in other causes of action.

For infringement of federally granted intellectual property rights, the remedies available to the owner of those rights are defined by statute. Specifically, remedies for infringement of a patent right include injunctions,<sup>182</sup> monetary damages,<sup>183</sup> and attorney's fees.<sup>184</sup> For trademark infringement, remedies include injunctions,<sup>185</sup> monetary damages, costs and attorney's fees,<sup>186</sup> and destruction of infringing articles.<sup>187</sup> Remedies for copyright infringement include injunction,<sup>188</sup> impoundment and disposition of infringement articles,<sup>189</sup> damages and profits or statutory damages,<sup>190</sup> and costs and attorney's fees.<sup>191</sup> Special remedies for particular types of copyrighted materials are also set forth in 17 U.S.C. § 510 (alteration of programming by cable systems),<sup>192</sup> for example, and remedies for infringement of mask works are disclosed in 17 U.S.C. § 911.<sup>193</sup>

Injunctions are a common equitable device utilized in infringement actions to ensure that no further infringement occurs.<sup>194</sup> Of course, the intellectual property rights of the plaintiff are at issue in infringement actions. A breach of contract action, where the contract is a license granting rights associated with intellectual property, is another cause of action in which the court is likely to impose equitable relief at judgment. In *PRC Realty Systems, Inc. v. National Ass'n of Realtors, Inc.*,<sup>195</sup> for example, the licensee was found to have breached its agreement with the licensor. The equitable relief granted to the licensor placed restrictions on the licensee with regard to the sublicenses it had granted.<sup>196</sup>

When an intangible asset is not at issue in the case but is to be used to satisfy a monetary judgment, few statutory provisions exist to override the immunity of those assets from a writ of execution. As previously discussed, bankruptcy is one such cause of action.<sup>197</sup>

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182. 35 U.S.C. § 283 (1993).

183. *Id.* § 284.

184. *Id.* § 285.

185. 15 U.S.C. § 1116 (1993).

186. *Id.* § 1117.

187. *Id.* § 1118.

188. 17 U.S.C. § 502 (1993).

189. *Id.* § 503.

190. *Id.* § 504.

191. *Id.* § 505.

192. *Id.* § 510.

193. *Id.* § 911.

194. See, e.g., *Intel Corp. v. ULSI System Tech, Inc.*, 995 F.2d 1566 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 923 (1994).

195. 766 F. Supp. 453 (E.D. Va. 1991), *aff'd in part, rev'd in part*, 972 F.2d 341 (4th Cir. 1992).

196. *Id.* at 462-63.

197. See *supra* note 77.

### C. Equitable Measures

With the intent of protecting the judgment creditor's interest in the judgment debtor's intellectual property assets to satisfy a judgment, four equitable measures are considered in this Note as potential candidates for use with alternative procedures to a writ of execution. Considered are: (1) a preliminary injunction or temporary restraining order; (2) issuance of a freeze order; (3) imposition of an equitable lien; and, (4) an injunction at the conclusion of the civil suit.

Two equitable measures commonly used in infringement actions are the preliminary injunction<sup>198</sup> and the temporary restraining order.<sup>199</sup> An *ex parte* temporary restraining order is granted at the commencement of trial without providing notice to the defendant.<sup>200</sup> Temporary restraining orders are justified because "[i]mmediate action is vital when imminent destruction of the disputed property, its removal beyond the confines of the state, or its sale to an innocent third party is threatened."<sup>201</sup>

The key to the use of both of these measures is that either the conduct or the property restrained is at issue in the case. Thus, when the issue is the infringement of intellectual property rights, restrictions may be placed on the defendant from taking further action that constitutes additional infringement<sup>202</sup> or from dispensing with tangible objects associated with the right allegedly infringed.<sup>203</sup>

For a civil action in which the intangible assets of the defendant are not the subject of the suit but are expected to be reached in satisfaction of the ultimate judgment,<sup>204</sup> the general rule is that judgment must first be rendered prior to exercising equitable action to secure the possible interest of the judgment debtor in those assets. However, there is some contrary movement in the courts in limited circumstances.<sup>205</sup>

Although a preliminary injunction is generally "not permissible to secure post-judgment legal relief in the form of damages,"<sup>206</sup> an equitable remedy may be secured with a preliminary injunction.<sup>207</sup> Courts have frozen a defendant's assets to secure

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198. A preliminary injunction is one "granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right to which is in dispute." BLACK'S LAW DICTIONARY 784-85 (6th ed. 1990).

199. A temporary restraining order is "[a]n emergency remedy of brief duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence." *Id.* at 1464.

200. *In re Vuitton et Fils S.A.*, 606 F.2d 1, 3-4 (2d Cir. 1979).

201. *Id.* at 4.

202. See, e.g., *Payless Shoesource, Inc. v. Reebok Int'l. Ltd.*, 998 F.2d 985, 987, 991 (Fed. Cir. 1993).

203. See, e.g., *In re Vuitton et Fils S.A.*, 606 F.2d 1. In this case the defendant was a member of a network of individuals who infringed the plaintiff's trademark rights. *Id.* at 2. When one of the infringers was sued, it would transfer its counterfeit merchandise to another member of the network, resulting in a "shell game" that made the plaintiff's rights difficult to enforce. *Id.* Because the plaintiff made a sufficient showing of this network, the Second Circuit ordered the district court to grant an *ex parte* temporary restraining order. *Id.* at 3, 5.

204. See *supra* notes 182-91 and accompanying text.

205. See *FSLIC v. Dixon*, 835 F.2d 554, 560 n.1 (5th Cir. 1987).

206. *Id.* at 560.

207. *Id.*

equitable relief for the plaintiff by imposing a preliminary injunction in a trademark infringement action where the plaintiff prayed for equitable relief in the form of an accounting of assets,<sup>208</sup> by granting restitution in an action against banking officers allegedly engaged in illegal lending practices,<sup>209</sup> by imposing a constructive trust on property in a case involving alleged Racketeer Influenced and Corrupt Organizations Act (RICO) violations,<sup>210</sup> and by ordering rescission in a Federal Trade Commission (FTC) case wherein the defendants allegedly violated the FTC's Franchise Rule.<sup>211</sup> These cases also illustrate that, although not all the assets of the defendant may be necessary in view of the equitable relief sought, essentially all the defendant's assets may be frozen by a preliminary injunction.<sup>212</sup>

In view of these cases, the nature of the cause of action and the type of relief prayed for apparently dictate whether the court may grant a preliminary injunction to freeze the defendant's assets, including the intangible assets. As stated in *Reebok International, Ltd. v. Marnatech Enterprises, Inc.*, "[t]he authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy."<sup>213</sup> An asset freeze is not appropriate merely to preserve assets for application to monetary damages that may be awarded.<sup>214</sup> Therefore, in general, a preliminary injunction will not be granted to restrict the actions of the defendant in disposing of or diminishing the value of its intangible assets.

The third equitable measure that could possibly be imposed is an equitable lien on the intangible assets of the defendant. The lien could be either: (1) statutory; or (2) equitable. As discussed previously, jurisdictions vary on the point at which a lien is levied on intangible assets when enforcement proceedings alternative to a writ of execution are utilized to reach the judgment debtor's intangible assets. Therefore, the imposition of a lien by the court prior to or at the time of judgment may be desirable to secure the judgment creditor's interest in those assets.

As discussed by Mr. William J. Woodward, Jr., the legislatures of some jurisdictions have passed statutes permitting the imposition of a lien on intangible assets.<sup>215</sup> The judgment creditor is permitted to place a lien on the personal property, including intangible property, of the judgment debtor with relative ease.<sup>216</sup> Although such liens have been criticized for the problems they create in bankruptcy cases and cases involving secured lending under Article 9 of the Uniform Commercial Code,<sup>217</sup> such statutes benefit

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208. *Reebok Int'l, Ltd. v. Marnatech Enter., Inc.*, 970 F.2d 552, 562-63 (9th Cir. 1992).

209. *Dixon*, 835 F.2d at 562-63.

210. *Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989).

211. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

212. See *Dixon*, 835 F.2d at 565 (leaving defendants an allowance to pay attorneys' fees) and *Marcos*, 862 F.2d at 1358 (leaving defendants an amount sufficient for attorneys' fees and normal living expenses).

213. *Reebok Int'l, Ltd. v. Marnatech Enter., Inc.*, 970 F.2d 552, 560 (9th Cir. 1992) (quoting *Singer*, 668 F.2d at 1113).

214. *Id.* at 560 (citing *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945)).

215. *Woodward*, *supra* note 6.

216. *Woodward*, *supra* note 6.

217. *Woodward*, *supra* note 6.

the judgment creditor who has secured judgment in a civil suit. Although only available in some jurisdictions, the statutory lien provides a useful tool for protecting the judgment creditor's interest in the intangible assets of the judgment debtor.

In some actions, courts may be granted the equitable authority by statute to impose a judicial lien on the property of the defendant. Consider, for example, *United States v. Ross*<sup>218</sup> wherein the court appointed a receiver for the assets of the defendant to oversee the payment of income taxes.<sup>219</sup> The court had the authority to grant a preliminary injunction including the receivership by Section 7403 of the Internal Revenue Code to enforce a lien on the property.<sup>220</sup> In considering whether to require the defendant to deliver its property to the receiver, the court stated that it had "no doubt of [its] power to do so. There is a perfect analogy between an action such as this and the familiar judgment creditor's action to reach assets which are not subject to levy of execution."<sup>221</sup> This, then, raises the question of whether a court may impose, absent a statute to the contrary, an equitable lien on the judgment debtor's intangible assets prior to the commencement of the alternative proceedings to secure the monetary damages awarded.

An equitable lien has been imposed on a business's trademark in both Illinois<sup>222</sup> and New Jersey.<sup>223</sup> Both jurisdictions considered the equitable lien an appropriate equitable remedy for securing the judgment creditor's interest in the trademark(s) of the judgment debtor.<sup>224</sup> Although the equitable lien does not "give the lienholder an in gross property right to the trademark itself," it is "a charge on property for the purpose of security."<sup>225</sup> Because the trademark may not be sold separately from the business or goodwill,<sup>226</sup> the equitable lien assists the judgment creditor in making its claim to the potential purchaser known. It does not transfer ownership of the trademark to the judgment creditor.

From these cases, an equitable lien is apparently a viable equitable measure available to the judgment creditor to secure the intangible assets of the judgment debtor to satisfy the judgment. The point in the proceedings at which a court may grant an equitable lien is uncertain;<sup>227</sup> however, if the judgment creditor is permitted to present information at trial regarding the assets of the judgment debtor, a court will possibly impose an equitable lien at the time the judgment is issued. Upon grant of such a lien, the judgment creditor should then record the lien in order to put others on notice of the lien. In the case of patents and trademarks, for example, the lien should be recorded by the United States

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218. 196 F. Supp 243 (S.D.N.Y. 1961), *order modified*, 302 F.2d 831 (2d Cir. 1962) (appointment of receiver affirmed).

219. *Id.* at 246.

220. *Id.* at 245.

221. *Id.*

222. *Adams Apple Distrib. Co., v. Papeleras Revinidas, S.A.*, 773 F.2d 925, 931 (7th Cir. 1985).

223. *Jacobs, Bell & Baumol v. Curtis*, 556 A.2d 817, 818 (N.J. 1989).

224. *Adams Apple Distrib. Co.*, 773 F.2d at 931; *Jacobs, Bell & Baumol*, 556 A.2d at 818.

225. *Adams Apple Distrib. Co.*, 773 F.2d at 931.

226. See *supra* notes 159-63 and accompanying text.

227. In *Adams Apple Distrib. Co.*, the trial court granted the plaintiff's motion for an equitable lien after the damages trial. 773 F.2d at 927-28. In *Jacobs, Bell & Baumol*, the equitable lien was imposed as a result of the judgment creditor seeking to have the trademark sold at a judicial sale at the conclusion of the determination of the amount of monetary damages due. 556 A.2d at 817.

Patent and Trademark Office.<sup>228</sup> For copyrights, the lien should be recorded by the Copyright Office.<sup>229</sup>

In their willingness to impose an equitable lien, some courts demonstrate their understanding of the frustrations experienced by judgment creditors in trying to reach the intangible assets of judgment debtors. In addition to an equitable lien, a judgment creditor may wish to impose further restrictions on the judgment debtor's intangible assets. Such restrictions may include, for example, a moratorium on the efforts by the judgment debtor to devalue the intangible assets. The options available depend on the specific alternative procedure(s) available in the jurisdiction.

In New York, there are two statutory provisions that allow the judgment creditor to impose restrictions on the judgment debtor's property.<sup>230</sup> The first of these provisions permits restriction as soon as the case is decided and before judgment.<sup>231</sup> Under this procedure, the future judgment creditor may begin to inquire about the future debtor's assets.<sup>232</sup> The second provision constitutes a restraining notice that is issued after judgment.<sup>233</sup> Therefore, in New York, the judgment creditor may have statutory recourse to protect its interests while engaged in supplementary proceedings.

In Indiana, the creditor may not institute supplementary proceedings until after a writ of execution has failed to satisfy the judgment.<sup>234</sup> Also, the judgment debtor is granted a hearing before a lien is placed on the property.<sup>235</sup> Because a hearing is required before the judgment debtor's property is levied, it is unlikely that the Indiana courts would be willing to impose any restrictions on the disposition of the intangible assets of the judgment debtors during the primary trial, *i.e.*, the civil suit.

The supplementary proceedings of Illinois differ from those of Indiana. First, the procedure "may be commenced at any time with respect to a judgment which is subject to enforcement."<sup>236</sup> The procedure is commenced by service of a citation by the clerk of the court on the judgment debtor (or a third party who holds the judgment debtor's assets).<sup>237</sup> Through the citation, as well as by the court during the supplementary proceedings, the judgment debtor may be prohibited from disposing of or devaluing the property sought in satisfaction of the judgment.<sup>238</sup> Thus, no hearing is first required before the court imposes restrictions on the judgment debtor's assets. It is therefore possible in Illinois that the judgment creditor may request that supplementary proceedings be commenced at the time judgment is issued in the civil suit and that the citation include

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228. 35 U.S.C. § 261 (recording assignments for patents) and 15 U.S.C. § 1060 (recording assignments for trademarks).

229. 17 U.S.C. § 205 (recording assignments for copyrights).

230. N.Y. CIV. PRAC. L. & R. 5222, 5229 (McKinney 1993).

231. *Id.* § 5229.

232. *Id.*

233. *Id.* § 5222.

234. IND. CODE ANN. §§ 34-1-44-1, 2.

235. IND. CODE ANN. § 34-1-44-7.

236. ILL. ANN. STAT. S. CT. R. 277(c) (Smith-Hurd 1993).

237. ILL. ANN. STAT. S. CT. R. 277(b) (Smith-Hurd 1993); ILL. ANN. STAT. ch. 735, para. 5/2-1402 (Smith-Hurd Supp. 1994).

238. ILL. ANN. STAT. ch. 735, para. 5/2-1402(d) (1), (2) (Smith-Hurd Supp. 1994).

restrictions regarding the disposition or devaluation of the judgment debtor's intangible assets.

If such restrictions are imposed at the time of judgment, a judgment debtor may object on the basis of procedural due process. The debtor may assert that a hearing is required prior to the imposition of the restrictions, as in Indiana. However, a hearing is not always required prior to seizure of the property, much less prior to the imposition of restrictions.<sup>239</sup> Furthermore, the due process requirements for prejudgment seizure have been summarized as follows:

- (1) the availability of *ex parte* prejudgment seizure must be limited to situations where plaintiff has established that the property to be seized is of a type that can be readily concealed, disposed of, or destroyed;
- (2) the plaintiff must allege specific facts based on actual knowledge supporting the underlying action and the right of plaintiff to seize the property;
- (3) the application for the order of seizure must be made to a judge rather than a clerk;
- (4) the defendant has a right to a prompt, post-seizure hearing to challenge the seizure; and,
- (5) the defendant must be able to recover damages from the plaintiff if the taking was wrongful and to regain possession of the seized items by filing a bond.<sup>240</sup>

If the opportunity of the judgment debtor to be heard during supplementary proceedings renders the restrictions on the judgment debtor's assets a "prejudgment seizure" (*i.e.*, pre-supplementary proceedings), the requirements of procedural due process appear to be met by Illinois' supplementary proceedings statute and rules. They require that the judgment creditor make the proper assertions, that the judge request the commencement of the proceedings upon a sufficient showing by the judgment creditor, and that the defendant is allowed to challenge the seizure at the supplementary proceedings.<sup>241</sup> It is likely that the judgment debtor may have a cause of action against the judgment debtor in the event the restrictions were unduly imposed because the supplementary proceedings do not "affect the rights of citation respondents [judgment debtors] in property prior to the service of the citation upon them. . . ."<sup>242</sup> However, because the supplementary proceeding does not violate the procedural due process rights of the judgment debtor, commencement of the proceedings at the time of judgment is a viable equitable measure for consideration by the litigator.

In conclusion, several equitable remedies may be utilized in conjunction with the alternative proceedings used in lieu of a writ of execution for reaching the intangible assets of the judgment debtor. First, a preliminary injunction may be used to secure post-judgment equitable relief where the cause of action and post-judgment equitable relief

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239. See *supra* text accompanying notes 177-81.

240. *Paramount Pictures Corp. v. Doe*, 821 F. Supp. 82, 87-88 (E.D.N.Y. 1993) (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)).

241. ILL. ANN. STAT. S. CT. R. 277 (Smith-Hurd 1993); ILL. ANN. STAT. ch. 735, para. 5/2-1402 (Smith-Hurd Supp. 1994).

242. ILL. ANN. STAT. ch. 735, para. 5/2-1402 (Smith-Hurd Supp. 1994).

concerns the property. This preliminary injunction may include a freeze order as to the disposition of essentially all of the defendant's assets. Second, an equitable lien may be imposed against the intangible assets of the judgment debtor. Third, it may be possible in some instances, consistent with the alternative proceeding(s) of the jurisdiction, to initiate the alternative proceeding and to impose restrictions on the disposition of the assets when a judgment is issued. Such a remedy acts as an injunction issued at time of judgment. However, the equitable lien and the "injunction" issued at judgment may not be viable in all jurisdictions. Further, a court may not exercise its equitable powers over the owner of intellectual property rights when the court does not have jurisdiction over the owner.<sup>243</sup>

### CONCLUSION

Numerous reasons justify a change in the law with regard to the immunity of intangible assets from levy by a writ of execution. First, the law in this area should be more consistent than it is today. For example, jurisdictional differences exist for the type of property that constitutes an intangible asset, the particular procedural alternative(s) available, and the point in time at which the judgment creditor is granted a lien on the assets to secure its interest in the assets. When the intangible assets of the judgment debtor are the federally-conferred rights in patents, trademarks, and copyrights which do not differ among the states, the law from jurisdiction to jurisdiction is particularly inconsistent.

Second, because tangible objects associated with the intellectual property rights are considered independent from the rights, the ability to secure these tangible objects by a writ of execution favors certain types of judgment debtors over others.

Third, the ability to reach the intangible assets is dependent upon the nature of the cause of action because statutory provisions are necessary to override the immunity of intangible assets from levy by a writ of execution.

Further, although it may be possible to ask a court to exercise its equitable powers to protect the judgment creditor's interest in the judgment debtor's intangible assets, even the imposition of equitable measures does not yield consistent protection to the judgment creditor. Such measures are claim-dependent and vary among jurisdictions. It is also possible that the judgment creditor has such recourse through statutory grant.

Other justifications for eliminating the immunity of intangible assets from a writ of execution include judicial efficiency and resulting "chilling" effects. By requiring intangible assets to be reached by supplementary proceedings, creditor's bills, and the like, the courts are burdened with additional proceedings to enforce monetary judgments awarded against entities having intangible assets as their primary or exclusive assets. Although the judicial system would likely continue to evaluate the assets of the judgment debtor to subject the judgment debtor's intangible assets to the writ of execution, the enforcement proceedings require additional filings and may, in some instances, be redundant with respect to information provided during the civil suit. The evolution of the business world has led to an increase in the value of intangible assets and, in particular, intellectual property. Also, technology has spurred an increase in the number of entities

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243. See *supra* text accompanying notes 127-31.

whose sole assets are its intellectual property rights. Therefore, the judicial system would benefit from being able to reach intangible assets by a writ of execution.

Two types of "chilling" may result from the immunity of intangible assets to a writ of execution. First, suits may be not filed against wrongdoers if the plaintiff is not able to sustain the additional costs associated with enforcing a judgment in its favor or if the wrongdoer's costs associated with enforcement of the judgment have a significant adverse impact on the amount of assets available to satisfy the judgment. Second, businesses, if aware of the difficulty in reaching intangible assets, may refrain from doing business with entities having primarily or exclusively intangible assets.

These problems could perpetuate indefinitely. Immunity is the rule, not the exception; and, the states have not generally promulgated legislation to overrule that immunity. Rather, alternative equitable proceedings, which vary from state to state, have been the only means by which intangible assets may be seized for an involuntary judicial sale. The United States has particular interest in the removal or transfer of intellectual property assets as the rights are primarily federally-conferred. The justifications for a change in the law may, therefore, call for a federal statute providing guidance or standards for the use of such assets to satisfy a judgment. Alternatively, a model civil procedure code for adoption by the states could be useful, but would not be as effective as a federal statute since each state would have to adopt it. However, this alternative may be more appropriate for intangibles other than federally-conferred intellectual property rights. In the interim, the litigator should be aware of the problems he or she may face in satisfying a judgment from an entity whose primary assets are intangible.

# RECOGNIZING THE CHILD'S CONSORTIUM ACTION BY DENYING THE SPOUSE'S

MELISSA S. YORK\*

## INTRODUCTION

A substantial number of state supreme courts refuse to recognize an action for a child's loss of parental consortium.<sup>1</sup> However, at least one court in a state that denies such recovery has acknowledged that "[w]hen the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise."<sup>2</sup> Recovery for loss of parental consortium has been denied on several grounds: the desire to await legislative action;<sup>3</sup> fear of multiplicity of claims and double recovery;<sup>4</sup> the absence of a legal right to a parent's love, guidance and companionship;<sup>5</sup> the remote nature of the injury and the inadequacy of monetary compensation;<sup>6</sup> and, the lack of the sexual element that is present in the spousal relationship.<sup>7</sup>

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1. Twenty state supreme courts have refused to recognize a child's action for loss of parental consortium. *Lewis v. Rowland*, 701 S.W.2d 122 (Ark. 1985); *Borer v. American Airlines, Inc.*, 563 P.2d 858 (Cal. 1977); *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo. 1986) (en banc); *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985); *Halberg v. Young*, 41 Haw. 634 (Haw. 1957); *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135 (Ind. 1990); *Hoffman v. Dautel*, 368 P.2d 57 (Kan. 1962); *Kelly v. United States Fidelity & Guar. Co.*, 357 So. 2d 1144 (La. 1978); *Durepo v. Fishman*, 533 A.2d 264 (Me. 1987); *Gaver v. Harrant*, 557 A.2d 210 (Md. 1989); *Salin v. Kloempken*, 322 N.W.2d 736 (Minn. 1982); *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 513 N.W.2d 870 (Neb. 1994); *General Elec. Co. v. Bush*, 498 P.2d 366 (Nev. 1972); *Russell v. Salem Transp. Co.*, 295 A.2d 862 (N.J. 1972); *DeAngelis v. Lutheran Medical Ctr.*, 449 N.E.2d 406 (N.Y. 1983); *Vaughn v. Clarkson*, 376 S.E.2d 236 (N.C. 1989); *Morgel v. Winger*, 290 N.W.2d 266 (N.D. 1980); *High v. Howard*, 592 N.E.2d 818 (Ohio 1992); *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318 (Or. 1982); *Steiner v. Bell Tel. Co.*, 540 A.2d 266 (Pa. 1988).

2. *Hoffman*, 368 P.2d at 59.

3. *Lewis*, 701 S.W.2d at 124; *Lee*, 718 P.2d at 234; *Zorzos*, 467 So. 2d at 307; *Hoffman*, 368 P.2d at 60; *Durepo*, 533 A.2d at 265; *Morgel*, 290 N.W.2d at 267; *High*, 592 N.E.2d at 820.

4. *Borer*, 563 P.2d at 860; *Lee*, 718 P.2d at 233.

5. *Lewis*, 701 S.W.2d at 124-25; *Russell*, 295 A.2d at 864; *High*, 592 N.E.2d at 820.

6. *Borer*, 563 P.2d at 862; *Lee*, 718 P.2d at 233; *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318 (Or. 1982).

7. *Borer*, 563 P.2d at 863; *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135, 1136 (Ind. 1990); *Salin v. Kloempken*, 322 N.W.2d 736, 739 (Minn. 1982); *Vaughn v. Clarkson*, 376 S.E.2d 236, 236-37 ("If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured.").

At the same time, an overwhelming majority of states recognize a spousal consortium claim.<sup>8</sup> Although the spousal action as recognized at common law was strictly for the benefit of the husband, the right has more recently been extended to the wife as well.<sup>9</sup> Courts have distinguished this claim from the child's on several grounds: the "right" to spousal consortium as a result of the marriage contract,<sup>10</sup> the sexual aspect and the possibility of the loss of childbearing,<sup>11</sup> the "foreseeability" that an injured party's spouse

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8. The spousal consortium claim has been recognized by nine state legislatures and 28 state supreme courts. COLO. REV. STAT. ANN. § 14-2-209 (1987); ME. REV. STAT. ANN. tit. 19, § 167-A (West 1964); MISS. CODE ANN. § 93-3-1 (1972); N.H. REV. STAT. ANN. § 507 (8-a) (1983); OKLA. STAT. ANN. tit. 43, § 214 (West 1990); OR. REV. STAT. § 108.010 (1989); S.C. CODE ANN. § 15-7520 (Law Co-op. 1976); TENN. CODE ANN. § 5-1-106 (1980); VT. STAT. ANN. tit. 12, § 5431 (Supp. 1991); *Swartz v. United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); *Schreiner v. Fruit*, 519 P.2d 462 (Alaska 1974); *City of Glendale v. Bradshaw*, 503 P.2d 803 (Ariz. 1972); *Hopson v. St. Mary's Hosp.*, 408 A.2d 260 (Conn. 1979) (recognizing a cause of action for both spouses); *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971); *Rindlisbaker v. Wilson*, 519 P.2d 421 (Idaho 1974); *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960); *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969); *Childers v. McGee*, 306 N.W.2d 778 (Iowa 1981); *Kotsiris v. Ling*, 451 S.W.2d 411 (Ky. 1970); *Deems v. Western Md. Ry.*, 231 A.2d 514 (Md. 1967); *Olson v. Bell Tel. Lab., Inc.*, 445 N.E.2d 609 (Mass. 1983); *Montgomery v. Stephan*, 101 N.W.2d 227 (Mich. 1960); *Thill v. Modern Erecting Co.*, 170 N.W.2d 865 (Minn. 1969); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. 1963) (en banc); *General Elec. Co. v. Bush*, 498 P.2d 366 (Nev. 1972); *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1 (N.J. 1965); *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980) (allowing consortium action to both spouses); *Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230 (Ohio 1970); *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974); *Mariani v. Nanni*, 185 A.2d 199 (R.I. 1962); *Hoekstra v. Helgeland*, 98 N.W.2d 669 (S.D. 1959); *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978) (recognizing an action for both spouses); *Lundgren v. Whitney's, Inc.*, 614 P.2d 1272 (Wash. 1980); *King v. Bittinger*, 231 S.E.2d 239 (W. Va. 1976); *Peeples v. Sargent*, 253 N.W.2d 459 (Wis. 1977). Only four state supreme courts expressly deny recovery for spousal consortium. *Schmeck v. City of Shawnee*, 647 P.2d 1263 (Kan. 1982); *Roseberry v. Starkovich*, 387 P.2d 321 (N.M. 1963); *Ellis v. Hathaway*, 493 P.2d 985 (Utah 1972); *Bates v. Donnafield*, 481 P.2d 347 (Wyo. 1971).

9. Nine state legislatures and 25 state supreme courts have extended the husband's common law action to the wife. COLO. REV. STAT. ANN. § 14-2-209; ME. REV. STAT. ANN. tit. 19, § 167-A; MISS. CODE ANN. § 93-3-1; N.H. REV. STAT. ANN. § 507 (8-a); OKLA. STAT. ANN. TIT. 43, § 214; OR. REV. STAT. § 108.010; S.C. CODE ANN. § 15-7520; TENN. CODE ANN. § 5-1-106; VT. STAT. ANN. tit. 12, § 5431; *Swartz*, 304 So. 2d 881; *Schreiner*, 519 P.2d 462; *City of Glendale*, 503 P.2d 462; *Gates*, 247 So. 2d 40; *Rindlisbaker*, 519 P.2d 421; *Dini*, 170 N.E.2d 881; *Troue*, 252 N.E.2d 800; *Childers*, 306 N.W.2d 778; *Kotsiris*, 451 S.W.2d 411; *Deems*, 231 A.2d 514; *Olson*, 445 N.E.2d 609; *Montgomery*, 101 N.W.2d 227; *Thill*, 170 N.W.2d 865; *Novak*, 365 S.W.2d 539; *General Elec. Co.*, 498 P.2d 366; *Ekalo*, 215 A.2d 1; *Millington*, 239 N.E.2d 897; *Hastings*, 246 N.W.2d 747; *Clouston*, 258 N.E.2d 230; *Hopkins*, 320 A.2d 139; *Mariani*, 185 A.2d 119; *Hoekstra*, 98 N.W.2d 669; *Lundgren*, 614 P.2d 1272; *King*, 231 S.E.2d 239; *Peeples*, 253 N.W.2d 459.

10. *Schreiner*, 519 P.2d at 464 (citing *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950)); *Lee*, 718 P.2d at 232; *Gates*, 247 So. 2d at 43; *accord* *Tribble v. Gregory*, 288 So. 2d 13, 16 (Miss. 1974); *Novak*, 365 S.W.2d at 543.

11. *Hopson*, 408 A.2d at 264; *Millington*, 239 N.E.2d at 900; *Clouston*, 258 N.E.2d at 235; *see also* cases cited *supra* note 9.

may also suffer damages as a result of such injury,<sup>12</sup> and the desire to limit tortfeasor liability.<sup>13</sup>

This Note will review the development of the common law consortium action as a reflection of changing societal values and realities. It will then examine the distinctions and reasoning courts have utilized in denying the child's action for loss of parental consortium while recognizing the corresponding spousal claim. Finally, it will suggest that current societal values (especially with regard to divorce rates, marital trends, family structures, and the growing emphasis on children's rights) and sound public policy considerations dictate that the child's action for loss of consortium be recognized while the spousal consortium claim be abolished.

### I. DEVELOPMENT OF THE CONSORTIUM ACTION

The common law consortium action developed from early Roman law, which allowed a man to maintain an action for injuries to his wife, children and slaves.<sup>14</sup> Such actions had their roots in a master-servant analogy, and damages consisted of the value of lost services.<sup>15</sup> A married woman injured by a third party had no legal identity and therefore no standing to bring suit in her own right. Instead, her husband sued jointly on behalf of himself and his wife for her injury.<sup>16</sup> The husband also had actions for injuries to the marital relationship resulting from the torts of criminal conversation and abduction. These early actions compensated the husband for the loss of the wife's services to which he was entitled in the eyes of the law.<sup>17</sup> The legal disabilities of the wife at early common law reflected the inferior social status of women at that time<sup>18</sup> as well as the legal fiction that

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12. *Hopson*, 408 A.2d at 264 ("Should the victim be married, it follows that the spouse may suffer personal and compensable, though not physical, injuries as a direct result of the defendant's negligence and that such injuries should not go uncompensated."); *Salin v. Kloempken*, 322 N.W.2d 736, 739 (Minn. 1982) (denying child's cause of action for parental consortium on the basis of, *inter alia*, foreseeability).

13. *Lewis v. Rowland*, 701 S.W.2d 122, 124 (Ark. 1985); *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977) ("[T]he courts must locate the line between liability and nonliability at some point . . . ."); *Lee*, 718 P.2d at 234; *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135, 1137 (Ind. 1990) (quoting *Borer*, 563 P.2d at 863); *Durepo v. Fishman*, 533 A.2d 264, 265 (Me. 1987); *Gaver v. Harrant*, 557 A.2d 210, 217 (Md. 1989) ("[W]e are also concerned with the substantial expansion of tortfeasor liability and the accompanying societal costs . . . ."); *Salin*, 322 N.W.2d at 739 (quoting *Stadler v. Cross*, 295 N.W.2d at 552, 554 (Minn. 1980)); *Russell v. Salem Transp. Co.*, 295 A.2d 862, 864 (N.J. 1972); *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 333 (Or. 1982).

14. WILLIAM L. PROSSER, THE LAW OF TORTS § 129, at 929 (4th ed. 1971); *see also* Robert J. Cooney and Kevin J. Conway, Note, *The Child's Right to Parental Consortium*, 14 J. MARSHALL L. REV. 341, 342-43 (1981).

15. B. HOLDSWORTH, A HISTORY OF ENGLISH LAW 427, 430 (2d ed. 1937).

16. *Guy v. Livesey*, 81 Eng. Rep. 428 (1619).

17. *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d. 257, 263 n.15 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964); Brett, *Consortium and Servitium—A History and Some Proposals*, 29 AUSTL. L.J. 321, 325-28 (1955); Note, *Judicial Treatment of Negligent Invasion of Consortium*, 61 COLUM. L. REV. 1341, 1343-44 (1961).

18. *Montgomery v. Stephan*, 101 N.W.2d 229, 230 (Mich. 1960) ("This, then, is the soil in which the

when a man and woman married, they became one entity "owned" by the husband.<sup>19</sup> Eventually the consortium action began to shift away from the emphasis on lost services and compensated the husband for the loss of the wife's society and injury to the marital relationship as elements of damage.<sup>20</sup>

In the mid-nineteenth century, Married Women's Acts established separate legal identities for wives.<sup>21</sup> Soon thereafter, courts were compelled to recognize a consortium action for the wife such as that which had long been recognized for the husband.<sup>22</sup> While a few states abolished the action altogether rather than extend it to the wife,<sup>23</sup> this alternative was widely rejected.<sup>24</sup> Further, some courts that initially abolished the action reconsidered their positions and now allow independent or joint actions for loss of spousal consortium.<sup>25</sup>

Today, the spousal consortium action recognizes "the right of each to the company, cooperation and aid of the other in every conjugal relation. Consortium means much more than mere sexual relation and consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage."<sup>26</sup> As such, it reflects the current nature of the marital relationship "as a single social and economic unit"<sup>27</sup> and the reality that "the common law as to consortium has evolved to meet changing times and conditions."<sup>28</sup> Where it is recognized,

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doctrine took root; the abject subservience of the wife to the husband, her legal nonexistence, her degraded position as a combination vessel, chattel and household drudge . . .").

19. Jesse C. Rickman, *Comment, The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 866 (1976); *see also* Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930).

20. PROSSER, *supra* note 14, § 124, at 873; *see also* HARPER AND JAMES, TORTS § 8.9 (1956).

21. Bill Leaphart and Richard E. McCann, *Consortium: An Action for the Wife*, 34 MONT. L. REV. 75, 79-80 (1973).

22. *See* Hittafer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950); *see also* cases cited *supra* note 9.

23. Marri v. Stamford St. R.R., 78 A. 582 (Conn. 1911); Helmstetler v. Duke Power Co., 32 S.E.2d 611 (N.C. 1945); Ellis v. Hathaway, 493 P.2d 985, 986 (Utah 1972); Kronenbitter v. Washburn Wire Co., 151 N.E.2d 898 (N.Y. 1958); Neuberg v. Bobowicz, 162 A.2d 662 (Pa. 1960).

24. Schreiner v. Fruit, 519 P.2d 462, 465 (Alaska 1974); City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972); Deems v. Western Md. Ry., 231 A.2d 514, 521 (Md. 1967) ("To overrule the common-law doctrine and to deny the claim of the husband as well as that of the wife in order to attain equality of treatment between them . . . it seems to us, is to throw out the baby with the bath water."); Montgomery v. Stephan, 101 N.W.2d 227, 232 (Mich. 1960); Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 546 (Mo. 1963); Ekalo v. Constructive Serv. Corp., 215 A.2d 1, 7 (N.J. 1965); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230, 235 (Ohio 1970); Hopkins v. Blanco, 320 A.2d 139, 141 (Pa. 1974); Hoekstra v. Helgeland, 98 N.W.2d 669, 681 (S.D. 1959).

25. Hopson v. St. Mary's Hosp., 408 A.2d 260, 265 (Conn. 1979); Nicholson v. Hugh Chatham Memorial Hosp., Inc., 266 S.E.2d 818, 823 (N.C. 1980); Whittlesey v. Miller, 572 S.W.2d 665, 668 (Tex. 1978).

26. Gates v. Foley, 247 So. 2d 40, 43 (Fla. 1971) (citing *Lithgow v. Hamilton*, 69 So. 2d 776 (Fla. 1954)).

27. Lee v. Colorado Dep't of Health, Inc., 718 P.2d 221, 232 (Colo. 1986).

28. Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles, 246 N.W.2d 747, 751 (N.D.

the child's action for loss of parental consortium likewise compensates for love, companionship, affection, society, services and solace.<sup>29</sup>

## II. CHANGING SOCIETAL VALUES AND FAMILY STRUCTURE

### A. *Divorce*

An explosion of the incidence of divorce occurred in the United States in the 1960s and 1970s.<sup>30</sup> The divorce rate more than doubled between 1963 and 1975.<sup>31</sup> By 1985 almost one-quarter of all persons who had ever married had also divorced.<sup>32</sup> Today at least half of all marriages end in divorce.<sup>33</sup> Based upon recent data of the Census Bureau, the projected divorce rate for all marriages is forty percent. Although this figure represents a slight decline from the previously projected rate of fifty percent,<sup>34</sup> the divorce rate appears to have stabilized at a high level.<sup>35</sup>

As a result of the increased divorce rates in the United States, only a small minority of American households in recent years are traditional families, consisting of a married couple living with their two children. In 1970, such families comprised only thirteen percent of households, and although the number of such families has since increased by 1.7 million, their proportion to the total population has decreased to ten percent.<sup>36</sup> In fact, a recent Census Bureau report indicated that one out of every two (or 32.3 million) American children lived in a non-traditional nuclear family in 1991. Such "non-traditional" homes consisted of single-parents, step-parents, other relatives or non-relatives.<sup>37</sup> These changes prompted commentators to note that "[t]he traditional family

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1976) (justifying the extension of the husband's common law consortium action to the wife).

29. Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); *accord* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994 (Alaska 1987); Villareal v. State Dep't of Transp., 774 P.2d 213, 217 (Ariz. 1989); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass 1980); Keele v. St. Vincent Hosp. & Health Care Ctr., 852 P.2d 574, 578 (Mont. 1993) (Trieweiler, J., concurring) (extending the child's cause of action beyond injuries rendering parent a quadriplegic); Pence v. Fox, 813 P.2d 429, 433 (Mont. 1991); Williams v. Hook, 804 P.2d 1131, 1138 (Okla. 1991); Reagan v. Vaughn, 804 S.W.2d 463, 467 (Tex. 1991); Hay v. Medical Ctr. Hosp., 496 A.2d 939, 942 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 192 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830 (W. Va. 1990) (quoting Berger, 303 N.W.2d at 426); Theama v. City of Kenosha, 244 N.W.2d 513, 518 (Wis. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1174 (Wyo. 1990) (quoting Hoffman v. Dautel, 368 P.2d 52, 59 (Kan. 1962)).

30. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SINGLENESS IN AMERICA (Current Population Reports (series p-23, no. 162, 1990)) [hereinafter SINGLENESS].

31. Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553 (1984).

32. SINGLENESS, *supra* note 30.

33. David A. Hamburg, *The New Family: Investing in Human Capital*, CURRENT, July-Aug. 1993, at 4.

34. Barbara Vobejda, *Baby-Boom Women Setting Divorce Record: Census Data Underscore Dramatic Social Change in Last Two Decades*, WASH. POST, Dec. 9, 1992, at A, a1 [hereinafter Baby-Boom Women].

35. Barbara Vobejda, *Census Bureau Says Rapid Changes in Family Size, Style Are Slowing*, WASH. POST, June 24, 1993, at A, a21.

36. *Id.*

37. *Half of Nation's Children Live in Non-Traditional Families*, CENSUS BUREAU REPORTS (Census

with a breadwinner-husband and a homemaker wife who live with their biological children is certainly an anomaly in America today."<sup>38</sup> In a commencement speech to Notre Dame University graduates in May of 1992, former President Bush called the American family "an institution under siege," noting America's distinction as the world's leader in divorce rates.<sup>39</sup>

### B. Single-Parent Families

Changes in American lifestyles have also resulted in increased numbers of single-parent families. The Census Bureau recently reported increasing proportions of never-married mothers. Approximately twenty-four percent of single women aged eighteen to forty-four had conceived a child out of wedlock, compared with fifteen percent ten years earlier.<sup>40</sup> Further, the number of single parents in the United States increased from 3.8 million in 1970 to 10.5 million in 1992, and has stabilized at increased rates since 1980.<sup>41</sup>

As a result of the increased numbers of unmarried mothers and high divorce rates, the proportion of children under the age of eighteen living with a single parent increased from twelve percent in 1970 to twenty-seven percent in 1993.<sup>42</sup> Additionally, sixteen percent of children in two-parent homes are living with one stepparent.<sup>43</sup> Most single parent households in the United States are headed by women, and tend to be lower income.<sup>44</sup> As a result, increasingly large proportions of children are living below the poverty level: from fourteen percent in the 1970s to twenty-one percent in 1991.<sup>45</sup>

### C. Postponement and Lower Incidence of Marriage

Since 1960, the number of young adults choosing to postpone marriage has increased markedly. In 1960, only twenty-eight percent of women and fifty-three percent of men aged twenty to twenty-four had never married, compared to sixty-three and seventy-nine percent, respectively, in 1990.<sup>46</sup> Similarly, in 1990, those aged twenty-five to twenty-nine

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Bureau Press Release No. 121, August 30, 1994).

38. Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990/1991).

39. Dan Balz, *Bush Ties Social Ills to Ailing Families: Notre Dame Graduation Speech Stresses Need to Bolster Home Life*, WASH. POST, May 18, 1992, at A, a10. "President Bush told a commencement audience here today that the nation's social problems cannot be erased until the family is first strengthened and restored." *Id.*

40. *Single Mothers on the Rise Regardless of Background*, Census Bureau Reports (Census Bureau Press Release No. 127, July 14, 1993).

41. *Pace of Change in Household Composition Slowed in the 1980's and Early 90's*, Census Bureau Reports (Census Bureau Press Release No. 109, June 24, 1993).

42. LIFE AS AND WITH A SINGLE PARENT, March Current Population Survey (August 17, 1994).

43. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FAMILY LIFE TODAY . . . AND HOW IT HAS CHANGED (Current Population Reports (series p-23, no. 181, 1992)) [hereinafter FAMILY LIFE].

44. Sheryl L. Scheible, *Women as Single Parents: Confronting Institutional Barriers in the Courts, the Workplace, and the Housing Market*, 23 FAM. L.Q. 131 (1989) (reviewing ELIZABETH MULROY, WOMEN AS SINGLE PARENTS (1988)) [hereinafter *Women as Single Parents*].

45. FAMILY LIFE, *supra* note 43.

46. FAMILY LIFE, *supra* note 43.

were much less likely to have married: forty-five percent of men and thirty-one percent of women.<sup>47</sup> According to a Census Bureau demographer, the fraction of the population that will never marry has doubled from five percent in the 1950s to ten percent in 1991. As a result, a smaller portion of adult life is being spent within marriage.<sup>48</sup>

Further, children in single-parent households are now almost equally likely to be living with a never-married parent as with a divorced one: In 1993, thirty-seven percent of such children were living with a divorced parent, compared with thirty-five percent living with a never-married parent.<sup>49</sup> Only a decade ago, the number of children living with a divorced parent was twice the number of children living with a never-married parent.<sup>50</sup> These recent lifestyle changes prompted a sociologist at Johns Hopkins University to comment that “[t]here’s been a turn away from marriage in the last decade or two. That partly has been compensated by people living together. But the institution of marriage doesn’t seem as strong as it used to be.”<sup>51</sup>

#### *D. Increasing Awareness of Children’s Rights*

In recent years, the notion of a child as a “chattel” belonging to his parents has eroded.<sup>52</sup> As a result, society and courts are increasingly recognizing children as individuals with rights.<sup>53</sup> This change is reflected in many states’ Wrongful Death Statutes, which allow a child to recover for the death of a parent<sup>54</sup> and in child custody determinations that require consideration of the best interests of the child.<sup>55</sup> The new emphasis on children’s rights is perhaps most apparent in a recent Indiana case involving

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47. FAMILY LIFE, *supra* note 43.

48. *Baby-Boom Women*, *supra* note 34.

49. *Gap Narrows Between Children Living with A Divorced or Single Parent, Census Bureau Finds* (Census Bureau Press Release No. 108, July 20, 1994).

50. *Id.*

51. Barbara Vobejda, *Americans Spending Less Time Married; Rates Are Lowest in Two Decades While Cohabitation is Common*, WASH. POST, Aug. 26, 1992, at A, a1.

52. Williams v. Hook, 804 P.2d at 1131, 1134-35 (Okla. 1991) (noting Steiner v. Bell Tel. Co., 517 A.2d 1348, 1351 (Pa. Super. Ct. 1986)); Belcher v. Goins, 400 S.E.2d 830, 836 (W. Va. 1990) (“[M]inor children have many of the same rights as adults, rather than being mere chattels.”).

53. Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981) (recognizing the child’s action for loss of parental consortium). “The importance of the child to our society merits more than lip service. Convinced that we have too long treated the child as a second-class citizen or some sort of non-person we feel constrained to remove the disability we have imposed.” *Id.*

54. *E.g.*, Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994 (Alaska 1987); Villareal v. State Dep’t of Transp., 774 P.2d 213, 218 (Ariz. 1989); Borer v. American Airlines, Inc., 563 P.2d 858, 865 (Cal. 1977); Zorzos v. Rosen, 467 So. 2d 305, 307 (Fla. 1985); Durepo v. United States Fidelity & Guar. Co., 533 A.2d 264, 265-66 (Me. 1987); Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690, 695 (Mass. 1980); High v. Howard, 592 N.E.2d 818, 820 (Ohio 1992); *Williams*, 804 P.2d at 1136; Reagan v. Vaughan, 804 S.W.2d 463, 465 (Tex. 1991); Ueland v. Reynolds, 691 P.2d 190, 192 (Wash. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1175 (Wyo. 1990).

55. Pence v. Fox, 813 P.2d 429, 433 (Mont. 1991) (indicating that the policy of allowing a child’s parental consortium action is consistent with the “best interests of the child test” in child custody determinations).

two unmarried teachers who conceived a child, and contractually agreed that the father would be held harmless for monetary and emotional support of their child.<sup>56</sup> Three years later, the child's mother filed suit as the child's next friend to establish paternity and to obtain child support and medical expenses. The trial court found the written agreement, entered into between the parties prior to the child's conception, void as against public policy and ordered the father to pay child support. The appellate court affirmed, holding the written agreement "unenforceable because a parent has no right to contract away a child's support benefits."<sup>57</sup> In reaching its decision, the court also noted that "[i]t is apparent that our legislature has created a strong current public policy (and not merely maintained an ancient one) with the object of protecting the rights of the state."<sup>58</sup> Indeed, the United States Supreme Court acknowledged children as persons under the Constitution in 1969.<sup>59</sup>

### III. RECOGNIZING THE ACTION FOR LOSS OF PARENTAL CONSORTIUM

Although a number of courts have expanded the common law consortium action to include the child's claim for loss of parental consortium,<sup>60</sup> the majority continue to deny such recovery.<sup>61</sup> They are often compelled to distinguish between the child's claim and the corresponding, highly recognized spousal action.<sup>62</sup> Courts have offered many reasons for their adverse positions, denying recovery to children on the following grounds: lack of legislative approval;<sup>63</sup> fear of multiple claims and double recovery;<sup>64</sup> the absence of a legal right to a parent's love, guidance and companionship;<sup>65</sup> injury that is too remote and for which monetary compensation is inadequate;<sup>66</sup> and the absence of the sexual element of the spousal interest.<sup>67</sup>

Many courts have indicated that the decision to permit the child's recovery for loss of parental consortium should be left to state legislatures "in this area in which judicial decree is no substitute for the exhaustive gathering of socio-economic facts and the public debate upon the import of those facts that would occur before the . . . [I]legislature enacted so sweeping an embellishment on the existing tort law of this state."<sup>68</sup> However, some

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56. *Straub v. B.M.T.*, 626 N.E.2d 848 (Ind. Ct. App. 1993), *affirmed* 645 N.E.2d 597 (Ind. 1994).

57. *Id.* at 852.

58. *Id.* at 851-52.

59. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969); *see also Goss v. Lopez*, 419 U.S. 565 (1975) (recognizing child's due process right to notice and hearing in school disciplinary process); *Gomez v. Perez*, 409 U.S. 535 (1973) (recognizing equal protection right of illegitimate children to maintain civil action against parent for failure to support).

60. *See* cases cited *supra* note 29.

61. *See* cases cited *supra* note 1.

62. *See* cases cited *supra* note 1.

63. *See* cases cited *supra* note 3.

64. *See* cases cited *supra* note 4.

65. *See* cases cited *supra* note 5.

66. *See* cases cited *supra* note 6.

67. *See* cases cited *supra* note 7.

68. *Durepo v. Fishman*, 533 A.2d 264, 265 (Me. 1987); *accord Lewis v. Rowland*, 701 S.W.2d 122,

courts awaiting legislative approval of the child's action developed a common law action on behalf of the wife<sup>69</sup> and rejected invitations to deny the spousal consortium claim in total.<sup>70</sup> If legislative approval were the well-reasoned alternative to common law development, the spousal claim would be widely abolished as unsupported by legislative action. Indeed, many courts allowing a common law action for loss of parental consortium considered and rejected the argument that the issue is one for legislative determination,<sup>71</sup> noting that "loss of consortium has been repeatedly recognized as a cause of action created and developed by the courts. We have long recognized our responsibility to adapt the common law to the needs of society as justice requires where the legislature has not spoken."<sup>72</sup>

With the exception of a very small minority of states where the spouse's right to damages for injury to the marital relationship has been initiated by legislative action,<sup>73</sup> spousal consortium actions are entirely creations of the common law.<sup>74</sup> Therefore, when

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124 (Ark. 1985); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 234 (Colo. 1986); *Zorzos v. Rosen*, 467 So. 2d 305, 307 (Fla. 1985); *Hoffman v. Dautel*, 368 P.2d 57, 60 (Kan. 1962); *Gaver v. Harrant*, 557 A.2d 210, 216 (Md. 1989); *Morgel v. Winger*, 290 N.W.2d 266, 267 (N.D. 1980); *High v. Howard*, 592 N.E.2d 818, 820 (Ohio 1992).

69. *Deems v. Western Md. Ry.*, 231 A.2d 514 (Md. 1967); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230 (Ohio 1970).

70. *Schreiner v. Fruit*, 519 P.2d 462, 465 (Alaska 1974); *City of Glendale v. Bradshaw*, 503 P.2d 803, 805 (Ariz. 1972); *Deems*, 231 A.2d at 521; *Montgomery v. Stephan*, 101 N.W.2d 227, 232 (Mich. 1960); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539, 546 (Mo. 1963); *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1, 7 (N.J. 1965); *Clouston*, 258 N.E.2d at 235; *Hopkins v. Blanco*, 320 A.2d 139, 141 (Pa. 1974); *Hoekstra v. Helgeland*, 98 N.W.2d 669, 681 (S.D. 1959).

71. See cases cited *supra* note 29; see also *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982) (rejecting child's action on other grounds). "We are aware that courts should not shirk their duty to overturn unsound precedent and should strive continually to develop the common law in accordance with our own changing society . . . . Accordingly, we do not rely on the rationale of those cases that have relegated this matter to the legislature." *Id.*

72. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 995 (Alaska 1987).

73. COLO. REV. STAT. § 14-2-209 (1987); ME. REV. STAT. ANN. tit. 19, § 167-A (West 1964); MISS. CODE ANN. § 93-3-1 (1972); N.H. REV. STAT. ANN. § 507 (8-a) (1983); OKLA. STAT. ANN. tit. 43, § 214 (West 1990); OR. REV. STAT. § 108.010 (1989); S.C. CODE ANN. § 15-7520 (Law. Co-op. 1976); TENN. CODE ANN. § 25-1-106 (1980); VT. STAT. ANN. tit. 12 § 5431 (Supp. 1991).

74. *Swartz v. United States Steel Corp.*, 304 So. 2d 881 (Ala. 1974); *Schreiner*, 519 P.2d 462; *City of Glendale*, 503 P.2d 803; *Hopson v. St. Mary's Hosp.*, 408 A.2d 260 (Conn. 1979); *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971); *Rindlisbaker v. Wilson*, 519 P.2d 421 (Idaho 1974); *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960); *Troue v. Marker*, 252 N.E.2d 800 (Ind. 1969); *Childers v. McGee*, 306 N.W.2d 778 (Iowa 1981); *Kotsiris v. Ling*, 451 S.W.2d 411 (Ky. 1970); *Deems*, 231 A.2d 514; *Olson v. Bell Tel. Lab., Inc.*, 445 N.E.2d 609 (Md. 1967); *Montgomery*, 101 N.W.2d 227; *Thill v. Modern Erecting Co.*, 170 N.W.2d 865 (Minn 1969); *Novak*, 365 S.W.2d 539; *General Elec. Co. v. Bush*, 498 P.2d 366 (Nev. 1972); *Ekalo*, 215 A.2d 1; *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818 (N.C. 1980); *Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976); *Clouston*, 258 N.E.2d 230; *Hopkins*, 320 A.2d 139; *Mariani v. Nanni*, 185 A.2d 119 (R.I. 1962); *Hoekstra*, 98 N.W.2d 669; *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); *Lundgren v. Whitney's*,

advanced by courts to justify denying the child's consortium action, the argument that legislatures are better suited to debate and decide such policy issues lacks force. Conversely, in recognizing the wife's consortium action, the Supreme Court of Illinois aptly pointed out that it found "no wisdom in abdicating to the legislature [its] essential function of re-evaluating common-law concepts in the light of present day realities."<sup>75</sup> Lack of legislative approval should not bar recognition of a child's action for loss of parental consortium.

Recognition of the child's consortium action has also been denied on the basis of fears of multiplicity of claims and double recovery.<sup>76</sup> Courts have consistently pointed out that "recognition of a right to recover for such losses in the present context, moreover, may substantially increase the number of claims asserted in ordinary accident cases, the expense of settling or resolving such claims, and the ultimate liability of the defendants."<sup>77</sup> Additionally, courts have asserted that a threat of double recovery exists in allowing the child's claim because juries may compensate the child's economic and emotional loss in an award to the parent.<sup>78</sup>

However, recognition of the child's action may actually result in fewer claims than the spousal action because not all married persons have children, and those who do are parents of minor children for a much shorter time than they are spouses.<sup>79</sup> Further, because the common law consortium action, initially available only to the husband, has been almost unanimously extended to the wife,<sup>80</sup> it is entirely logical to further extend the consortium action to children.<sup>81</sup> Finally, should the spousal claim be abolished, as advocated *infra*, courts may be much less reluctant to deny the child's action based on fears of double recovery because the action will no longer be viewed as an extension of the existing spousal action.

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Inc., 614 P.2d 1272 (Wash. 1980); King v. Bittinger, 231 S.E.2d 239 (W. Va. 1976); Peeples v. Sargent, 253 N.W.2d 459 (Wis. 1977).

75. *Dini*, 170 N.E.2d at 892.

76. *Borer v. American Airlines*, 563 P.2d 858, 860 (Cal. 1977); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 233 (Colo 1986).

77. *Borer*, 563 P.2d at 860 (denying parental consortium action to nine children of injured parent).

78. E.g., *Hoffman v. Dautel*, 368 P.2d 57, 58-59 (Kan. 1962) ("[J]uries as a matter of fact consider the plight of young children in fixing damages where the parent is seriously injured . . . ."); *Salin v. Kloempken*, 322 N.W.2d 736, 740 (Minn. 1982) ("[J]uries may already compensate the child for lost economic support through an award to the parent and, in addition, they may already indirectly factor in a child's emotional loss through an award to the parent.").

79. *Borer*, 563 P.2d at 869 (Mosk, J., dissenting) (arguing that recognition of the child's cause of action will actually result in less liability and lower insurance costs than the corresponding spousal action).

80. See sources cited *supra* note 9.

81. Courts recognizing the wife's consortium action have refused to judicially abolish the cause of action. See cases cited *supra* note 70.

The possibility of double recovery has been widely addressed, and firmly rejected,<sup>82</sup> as a barrier to allowing recovery to the wife in a spousal action.<sup>83</sup> Courts concerned with this issue have remedied the possibility of double recovery by requiring joinder of the spousal claims,<sup>84</sup> utilizing detailed jury instructions defining damages, or both.<sup>85</sup> Still other courts have considered and refused to require joinder, indicating that such a requirement is unnecessary because the claims of the husband and wife are "separate and distinct."<sup>86</sup> Finally, in acknowledging the wife's action, courts have commented that assessing consortium damages is no more difficult for a jury than computing damages for pain and suffering and emotional distress.<sup>87</sup>

The child's action for loss of parental consortium presents less danger of double recovery than the spousal claim because the parent-child relationship is independent of any spousal interest. Absent instruction to the contrary, a jury would be more likely to consider the spousal consortium interest in assessing the victim's damages due to the traditional "unified" concept of the marital relationship. Recognition of the more remote consortium interest of the child likewise does not present a danger of double recovery

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82. See cases cited *supra* note 78; *see also* *Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971); *Troue v. Marker*, 252 N.E.2d 800, 806 (Ind. 1969); *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539, 544 (Mo. 1963) (en banc); *Hoekstra v. Helgeland*, 98 N.W.2d 669, 682 (S.D. 1959) (defining the separate spousal claims resulting from negligent injury to one spouse).

83. *See, e.g., Schreiner v. Fruit*, 519 P.2d 462, 466 (Alaska 1974) (Recognizing the wife's action for spousal consortium, the court noted that "[t]he strongest objection which can be made to the granting of relief in this case is the possibility of double recovery."); *City of Glendale v. Bradshaw*, 503 P. 2d 803, 805 (Ariz. 1972); *Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 264 (Conn. 1979); *Deems v. Western Md. Ry.*, 231 A.2d 514, 522 (Md. 1967) (allowing only one joint recovery for spousal consortium to guard against the possibility of double damages); *Tribble v. Gregory*, 288 So. 2d 13, 17 (Miss. 1974) (limiting wife's recovery to loss of society, conjugal rights and physical spousal assistance); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818, 822-23 (N.C. 1980) (requiring joinder of consortium action with injured spouse's claim against tortfeasor).

84. *Gates*, 247 So. 2d at 45 (allowing defendant to spousal consortium action to request joinder of spouses' claims); *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1, 8 (N.J. 1965) ("In all future actions, the wife's consortium claim may be prosecuted only if joined with the husband's action."); *Nicholson*, 266 S.E.2d at 823 (requiring joinder of consortium action with physically injured spouse's claim against tortfeasor).

85. *E.g., Gates*, 247 So. 2d at 45 ("[T]he trial court should carefully caution the jury that any loss to the wife of her husband's material support is fully compensated by any award to him . . . and that the wife is entitled to recover only for loss of consortium as defined in this opinion."); *Montgomery v. Stephan*, 101 N.W.2d 227, 231 (Mich. 1960); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 234 (Ohio 1970) ("No authority has been cited indicating that courts have had difficulty with juries failing to follow instructions . . . ."); *Ekalo*, 215 A.2d at 6 ("[A] jury could be fully and fairly instructed as to the nature and limits of the independent demands for recovery."); *cf. Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 996 (Alaska 1987).

86. *Kotsiris v. Ling*, 451 S.W.2d 411, 413 (Ky. 1970); *accord City of Glendale*, 503 P.2d at 805; *Novak*, 365 S.W.2d at 544.

87. *Hopson*, 408 A.2d at 264; *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 902 (N.Y. 1968); *Hoekstra*, 98 N.W.2d at 682; *accord Hay v. Medical Ctr. Hosp.* 496 A.2d 939, 943-44 (Vt. 1985) ("Damages . . . are no more difficult to ascertain than in other classes of injury, involving intangible loss, where we have allowed recovery.").

where joinder may be required and proper jury instructions can adequately identify the child's "separate and distinct" damages.

Courts have also denied the child's action on the basis that a child, although entitled to a parent's support,<sup>88</sup> has no legal right to the love and affection of her parents.<sup>89</sup> These courts reason that to justify a consortium cause of action, they "would first have to recognize that a child has a legal claim against its [parent] for love, guidance and companionship before [they] could recognize the same claim against a third party."<sup>90</sup> However, this reasoning does not prevail in regard to the spousal consortium claim. Spouses have no legal claim against their marital partners for love, affection, sexual services and companionship in states where actions for adultery, criminal conversation, and alienation of affections have been abolished as outmoded by the changing views on marriage and divorce.<sup>91</sup> Nonetheless, the spousal consortium action continues to be recognized.<sup>92</sup>

Furthermore, the consortium action compensates one for the injury to the relationship with another.<sup>93</sup> As such, the action does not seek to create or enforce a positive relationship where none exists, as suggested by the "legal right" argument; rather, its purpose is to compensate for a valuable relationship that has been seriously injured or destroyed by the act of a third party.<sup>94</sup> Therefore, denying recovery on the basis that the child has no legal entitlement to a parent's love and affection is inconsistent with the courts' treatment of the spousal consortium claim.

The child's consortium action has further been denied on the assertion that injury to the parent-child relationship is too remote and incapable of adequate monetary compensation.<sup>95</sup> However, even courts denying the action have acknowledged that

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88. *Lewis v. Rowland*, 701 S.W.2d 122, 124 (Ark. 1985) ("Parents have a legal duty to support their minor children but not the legal duty to love them.").

89. *Id.*; *Russell v. Salem Transp. Co.*, 295 A.2d 862, 864 (N.J. 1972); *High v. Howard*, 592 N.E.2d 818, 820 (Ohio 1992).

90. *Lewis*, 701 S.W.2d at 124.

91. *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d at 318, 329 (Or. 1982); *cf. Berger v. Weber*, 303 N.W.2d 424, 426 (Mich. 1981); *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1, 3 (N.J. 1965) (noting that alienation of affections and similar spousal actions have been abolished by legislative action).

92. See cases cited *supra* note 91.

93. E.g., *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135, 1137 (Ind. 1990); *Hoffman v. Dautel*, 368 P.2d 57, 59 (Kan. 1962); *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 900 (N.Y. 1968) ("[T]he 'consortium' interest to be protected here does not rest on any medieval theory but on the real injury done to the marital relationship."); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978) ("[C]onsortium contemplates a single tortious act which injures both spouses by virtue of their relationship to each other."); *Theama v. City of Kenosha*, 344 N.W.2d 513, 521 (Wis. 1984).

94. *Villareal v. State Dep't of Transp.*, 774 P.2d 213, 219 (Ariz. 1989) (limiting action to severe parental injuries that destroy or nearly destroy the parent-child relationship); *accord Keele v. St. Vincent Hosp. & Health Care Ctr.*, 852 P.2d 574, 577 (Mont. 1993); *Williams v. Hook*, 804 P.2d 1131, 1138 (Okla. 1991) (requiring permanent loss of parental consortium as prerequisite to action); *Reagan v. Vaughan*, 804 S.W.2d 463, 467 (Tex. 1991) (requiring "serious, permanent, and disabling injuries" to the parent as a prerequisite to recovery).

95. *Borer v. American Airlines*, 563 P.2d 858, 862 (Cal. 1977); *Lee v. Colorado Dep't of Health*, 718

serious harm to the child results from an injury to the parent-child relationship<sup>96</sup> and that they "see little difference in terms of remoteness between the situation of a spouse seeking to recover for loss of consortium, and that of a minor child similarly seeking recovery for the loss of consortium."<sup>97</sup>

The issue of "remoteness" concerns the relationship between the tortfeasor and the primary tort victim (physically injured party)<sup>98</sup> and as such, is inapplicable to the independent consortium action, which compensates for damage to one's relationship with the victim. Although the "remote" nature of the injury has also been advanced as a basis for denying the wife's consortium action,<sup>99</sup> courts have overwhelmingly concluded that "[t]he loss in both [spousal] situations appears to us to be alike, and one is no more indirect than the other."<sup>100</sup> As a result, some courts recognizing the spousal action have acknowledged that because the injury to the parent-child relationship is no more remote than the injury to the marital relationship, an action for loss of parental consortium must be extended to children.<sup>101</sup>

In refusing the child's consortium action, it has also been asserted that:

[M]onetary compensation will not enable plaintiffs [children] to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal

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P.2d 221, 233 (Colo. 1986); *Norwest*, 652 P.2d at 322.

96. *E.g. Borer*, 563 P.2d at 866 ("We are keenly aware of the need of children for the love, affection, society and guidance of their parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy . . . ."); *Lee*, 718 P.2d at 233; *Hoffman*, 368 P.2d at 59; *Salin v. Kloempken*, 322 N.W.2d 736, 737 (Minn. 1982); *Norwest*, 652 P.2d at 323 ("We accept the view that a parent's disablement is likely to mean a painful and possibly permanent psychic injury to the child . . . .").

97. *Hay v. Medical Ctr. Hosp.*, 496 A.2d 939, 943 (Vt. 1985); *accord Berger v. Weber*, 303 N.W.2d 424, 427 (Mich. 1981) ("[W]e see no reason why the child's injury is any more remote than the injury in the spouse's cause of action.").

98. *Hay*, 496 A.2d at 943; *accord Berger*, 303 N.W.2d at 426-27; *Theama v. City of Kenosha*, 344 N.W.2d 513, 522 (Wis. 1984).

99. *Marri v. Stamford St. R.R.*, 78 A. 583 (Conn. 1911); *Troue v. Marker*, 252 N.E.2d 800, 805 (Ind. 1969); *Ekalo v. Constructive Serv. Corp.*, 215 A.2d 1, 5 (N.J. 1965) ("The position that her injuries are indirect or too remote to warrant legal protection runs counter to basic principles of negligence and causation . . . ."); *Roseberry v. Starkovich*, 387 P.2d 321, 324 (N.M. 1963); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818, 821 (N.C. 1980); *Hoekstra v. Helgeland*, 98 N.W.2d 669, 679 (S.D. 1959); *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978).

100. *Troue*, 252 N.E.2d at 805; *see also Schreiner v. Fruit*, 519 P.2d 462, 465-66 (Alaska 1974); *Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 264 (Conn. 1979); *Gates v. Foley*, 247 So. 2d 40, 44 (Fla. 1971) ("[N]o reasonable distinction may be made between the wife's claim for . . . consortium and a similar claim by her husband."); *Deems v. Western Md. Ry.*, 231 A.2d 514, 522 (Md. 1967); *Ekalo*, 215 A.2d at 5; *Nicholson*, 266 S.E.2d at 822; *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974); *Hoekstra*, 98 N.W.2d at 680; *Whittlesey*, 572 S.W.2d at 668; *Lundgren v. Whitney's, Inc.*, 614 P.2d 1272, 1275 (Wash. 1980).

101. *Villareal v. State Dep't of Transp.*, 774 P.2d 213, 218 (Ariz. 1989); *Hay*, 496 A.2d at 943; *Belcher v. Goins*, 400 S.E.2d 830, 838 (W. Va. 1990) ("Another basis for recognizing . . . parental consortium is the similarity of such consortium to spousal consortium, which is already judicially recognized.").

guidance, they will be unusually wealthy men and women. To say that plaintiffs have been "compensated" for their loss is superficial; in reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss.<sup>102</sup>

Likewise, a spousal consortium action does not compensate the marriage partner for the lost or damaged relationship with the injured party; rather, it provides an immediate monetary benefit wholly unrelated to the spouse's injury. Therefore, although this argument could logically be advanced to deny recovery for all tortious injuries, it is a basic principle of tort law that monetary compensation, though usually inadequate, is the only recovery available through the legal system.<sup>103</sup> Further, although monetary compensation may not restore or replace the injured parental relationship, courts have acknowledged that it may alleviate the child's loss in other ways: psychiatric treatment and adequate child care services—which may be made available by a monetary judgment—could offset the injury to the parental relationship by providing some measure of guidance and affection.<sup>104</sup>

Finally, courts have denied recovery for parental consortium on the theory that the spousal action primarily compensates for the injury to the sexual relationship, and this element is absent from the parent-child relationship.<sup>105</sup> Nevertheless, courts recognizing the spousal action have pointed out that the sexual relationship is merely one of many elements constituting the consortium action,<sup>106</sup> and that love, affection, companionship, comfort and society—elements common to both the spousal and parent-child relationship—are equally worthy of legal protection.<sup>107</sup> It has further been noted that an injury to a child's parent results in greater harm to the child than a similar injury to the relationship between two adults<sup>108</sup> because "the child's relational interest with the parent

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102. *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977).

103. *Theama v. City of Kenosha*, 344 N.W.2d 513, 520 (Wis. 1984) ("Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society . . .").

104. *E.g., Williams v. Hook*, 804 P.2d 1131, 1136 (Okla. 1991) ("[M]onetary compensation . . . may aid in ensuring the child's continued normal and complete mental development into adulthood, and lessen the impact of the loss."); *Hay*, 496 A.2d at 944; *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 194 (Wash. 1984); *Theama*, 344 N.W.2d at 516; *see also* David P. Dwork, Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 742 (1976).

105. *See* cases cited *supra* note 7.

106. *Berger v. Weber*, 303 N.W.2d 424, 426 (Mich. 1981); *Pence v. Fox*, 813 P.2d 429, 432 (Mont. 1991); *Hay*, 496 A.2d at 942; *cf. Sizemore v. Smock*, 422 N.W.2d 666, 669 (Mich. 1988).

107. *Berger*, 303 N.W.2d at 426; *Hay*, 496 A.2d at 942.

108. *Theama*, 344 N.W.2d at 516; *accord Villareal v. State Dep't of Transp.*, 774 P.2d 213, 217 (Ariz. 1989); *Weitl v. Moes*, 311 N.W.2d 259, 269 (Iowa 1982), *rev'd on other grounds*, *Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R.*, 335 N.W.2d 148 (Iowa 1983)); *Reagan v. Vaughn*, 804 S.W.2d 463, 466 (Tex. 1990); *Ueland*, 691 P.2d at 192; *see also* Dwork, *supra* note 104, at 742.

is characterized by dependence. In contrast, the parent's relational interest with the child is not. In a real sense, the child is 'becoming' and the parent 'has become.'"<sup>109</sup>

A young child needs the nurture and guidance of a parent for proper development.<sup>110</sup> When children are deprived of a positive parental influence due to death or injury, studies have shown that they exhibit higher rates of illness and psychiatric disorders and a higher incidence of juvenile delinquency.<sup>111</sup> Increased percentages of children live in single-parent homes.<sup>112</sup> In these cases, the effect on the child of injury to the parent—the child's sole or primary source of guidance and companionship—is much more pronounced than in the case where a child lives with both parents. The economic ramifications of injury to the head of a single-parent household also severely affect the child: Statistics show that single-parent households tend to be lower income.<sup>113</sup> A monetary judgment from a consortium action may be the only way the child can obtain funds for domestic assistance and necessary counseling.

Conversely, an adult whose spouse has been injured is more capable of adjusting to the loss by initiating new relationships to compensate for the injury to the spousal bond.<sup>114</sup> Courts that have considered recognizing the wife's consortium action in addition to the husband's have noted that juries may consider the injury to the marital relationship in assessing damages of the injured party.<sup>115</sup> However, as noted *supra*, injury to the parent-child relationship, lacking the traditional concept of "unity" that belongs to the marital relationship, is less likely to be considered as an element of damage accruing to the injured parent. The absence of unity from the parent-child relationship that does exist in the marital relationship is a factor to be considered in assessing damages, but should not stand as a bar to the cause of action itself.

Finally, with the stabilization of increased divorce rates at nearly fifty percent,<sup>116</sup> society has less incentive to protect the marital relationship, which stands a significant

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109. *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P. 2d 1171, 1175 (Wyo. 1990).

110. *E.g., Hoffman v. Dautel*, 368 P.2d 57, 59 (Kan. 1962); *Williams v. Hook*, 804 P.2d 1131, 1136 (Okla. 1991); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 194 (Wash. 1984); *Nulle*, 797 P.2d at 1174 ("The strategic significance of the family is to be found in its mediating function in the larger society."); *Dwork, supra* note 104, at 734.

111. Ronald Wenkart, Comment, *The Child's Cause of Action for Loss of Consortium*, 5 SAN FERN. V. L. REV. 449, 461 (1977).

112. See *FAMILY LIFE*, *supra* note 43.

113. See *Women as Single Parents*, *supra* note 44.

114. See *Dwork, supra* note 104, at 742; accord *Keele v. St. Vincent Hosp. & Health Care Ctr.*, 852 P.2d 574, 578 (Mont. 1978) (Trieweiler, J., specially concurring) ("And yet, there should be no dispute that disruption of the parent-child relationship will in most cases have much greater consequences than damage to the relationship between two adults."); *Hay v. Medical Ctr. Hosp.*, 496 A.2d 939, 942 (Vt. 1985); *Theama v. City of Kenosha*, 344 N.W.2d 513, 516 (Wis. 1984).

115. *Deems v. Western Md. Ry.*, 231 A.2d 514, 522 (Md. 1967) ("[T]hese marital interests are in reality so interdependent, because injury to these interests is so essentially incapable of separate evaluation . . . ."); *cf. Gates v. Foley*, 247 So. 2d 40, 45 (Fla. 1971); *Tribble v. Gregory*, 288 So. 2d 13, 17 (Miss. 1974); *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 234 (Ohio 1970); *Hoekstra v. Helgeland*, 98 N.W.2d 669, 682 (S.D. 1959).

116. *Hamburg, supra* note 33; *Baby-Boom Women*, *supra* note 34.

chance of dissolution regardless of the occurrence of the injury, than in protecting the parent-child bond, which can never be substantially replaced.<sup>117</sup> Although the sexual element is absent from the parent-child relationship, it is but one of many consortium components and not indicative of the gravamen of harm that results to the relationship. Therefore, lack of the sexual element of the spousal claim is a tenuous distinction upon which to deny a child's right to damages for the loss of parental consortium.

#### IV. DENYING THE SPOUSAL CONSORTIUM ACTION

In an attempt to justify recognition of the spousal consortium action while denying the child's similar cause, courts have been compelled to distinguish the seemingly similar claims and have done so on several grounds: a right to spousal consortium resulting from the marriage contract;<sup>118</sup> the important sexual element of the relationship and the possible deprivation of childbearing;<sup>119</sup> the foreseeability that an injured adult's spouse may also suffer damages as a result of the injury;<sup>120</sup> and the desire to limit tortfeasor liability.<sup>121</sup>

One common distinction holds that the spouse is entitled to consortium as a "right" resulting from the marriage contract,<sup>122</sup> and the child has no such legal entitlement. Courts recognizing the child's action have failed to advance any specific argument with regard to this theory, except to generally point out that a child has as great an interest in the love, guidance and companionship of a parent as the spouse has in the similar elements of the marital relationship.<sup>123</sup>

However, upon closer examination and in light of current social trends, the child's recovery for parental consortium is more appropriately allowed and the spousal action abolished on these grounds. An adult, upon marriage, voluntarily agrees to take the spouse "in sickness and in health." Certainly it is foreseeable to an adult mature enough to marry that an accident or act of violence may injure one's spouse at any time. Other causes of action recognizing the "right" to the consortium elements of the marital relationship, such as adultery, criminal conversation, and alienation of affections, have been abolished as "these actions for invasion of the family relationship were considered

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117. *Hay*, 496 A.2d at 944, ("[N]o amount of money can ever take the place of a lost parent."); *accord* *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977); *Williams v. Hook*, 804 P.2d 1131, 1136 (Okla. 1991); *Ueland v. Reynold Metals Co.*, 691 P.2d 190, 194 (Wash. 1984); *Theama*, 344 N.W.2d at 520 ("Therefore, we believe that denying the child's right to recover premised upon the belief that loss of a parent's society and companionship is irreplaceable would most certainly amount to a perpetuation of error."); *Dwork*, *supra* note 104, at 734 ("Money cannot replace a parent's love, care and companionship any more than it can replace a severed member . . . .").

118. *See* cases cited *supra* note 10.

119. *See* *supra* notes 9 and 11.

120. *See* cases cited *supra* note 12.

121. *See* cases cited *supra* note 13.

122. *See* cases cited *supra* note 10.

123. *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690, 692 (Mass. 1980) ("We are skeptical of any suggestion that the child's interest in this setting is less intense than the wife's."); *Berger v. Weber*, 303 N.W.2d 424, 427 (Mich. 1981); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1175 (Wyo. 1990).

outmoded by changing views of marriage, divorce, and sexual relations . . . .<sup>124</sup> Finally, continued high divorce rates and greater numbers of adults postponing and foregoing marriage<sup>125</sup> seem to indicate that the high expectation or existence of the positive, almost ethereal, qualities in marital relationships that were anticipated by spousal consortium actions no longer exists. Courts have idealistically described such qualities:

[the wifely] duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow.<sup>126</sup>

However, the changing views of and statistics relating to marriage and divorce indicate that these idealistic qualities are, in fact, outmoded and unrealistic.

Conversely, the minor child, dependent upon the parent for proper development and guidance, has not likewise consented to take the parent "in sickness and in health." In fact, the child whose parent is injured by a third party is deprived of the necessary parental relationship completely against her will and to society's detriment.<sup>127</sup> The child would receive the immediate benefit of monetary compensation for an injury to the parent-child relationship, but society receives the ultimate benefit "since ideally the child will become a normal adult who is capable of functioning as such in his or her own social setting."<sup>128</sup> As discussed *supra*, a monetary judgment from a consortium action may be the only means by which a child can obtain necessary counseling and child care services after injury to her parent.<sup>129</sup> These services contribute to the child's ability to become a productive and well-adjusted adult member of society.

In justifying recognition of the spousal consortium action while denying the child's, courts have also distinguished the claims on the basis of the sexual element of the spousal relationship,<sup>130</sup> often with particular emphasis on the possibility of the loss of

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124. *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 329 (Or. 1982); *cf. Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978) (noting that the tort of criminal conversation has been abolished by legislative action).

125. *See supra* subparts II.A. and II.C.

126. *Montgomery v. Stephan*, 101 N.W.2d 227, 234 (Mich. 1960) (recognizing the wife's action for loss of spousal consortium).

127. *See Villareal v. State Dep't of Transp.*, 774 P.2d 213, 217 (Ariz. 1989) ("Because every individual's character and disposition impact on society, it is of highest importance to the child and society that we protect the right to receive the benefits derived from the parental relationship."); *Berger*, 303 N.W.2d at 426 ("[S]ociety will also benefit if the child is able to function without emotional handicap."); *Hay v. Medical Ctr. Hosp.*, 496 A.2d 939, 946 (Vt. 1985) (quoting *Theama v. City of Kenosha*, 344 N.W.2d 513, 521 (Wis. 1984)); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 195 (Wash. 1984) (citing *Berger*, 303 N.W.2d at 424); *Nulle*, 797 P.2d at 1175.

128. *Theama*, 344 N.W.2d at 521; *Berger*, 303 N.W.2d at 426; *accord Hay*, 496 A.2d at 946; *Ueland*, 691 P.2d at 195.

129. *See supra* text accompanying notes 111-14.

130. *See* cases cited *supra* notes 9 and 11.

childbearing.<sup>131</sup> However, consortium includes elements of love, affection, society and companionship, and the loss of any one of these elements is sufficient for recovery.<sup>132</sup> Therefore, an action for loss of spousal consortium is not denied, nor an award reduced, where the couple, by age, choice or for other reasons, no longer engages in sexual activity; nor is it denied to spouses who have not been deprived of their plans for or capability of childbearing. In fact, it has been recognized that the spousal action "cannot fairly be limited . . . to sexually active couples: surely a husband or wife of advanced years suffers a no less compensable loss of conjugal society when his or her lifetime companion is grievously injured by the negligence of another."<sup>133</sup> Because the sexual element has been so noted as an insignificant factor within the spousal consortium action itself, it is a trivial distinction upon which to deny the child's action.

Recognition of the spousal action, with emphasis on the possibility of the loss of sexual activity and childbearing, actually presents a danger of double recovery to the spouse. Because the independent consortium action compensates the uninjured spouse for damage to the marital relationship, the partner has suffered an injury only so long as she remains married to the injured spouse. That is, even if the sexual relationship has been damaged by the act of a third party, or the couple's childbearing plans extinguished, the spouse who maintains the independent action for loss of spousal consortium has suffered no physical injury herself, but is awarded damages in an amount that will compensate her for the lifetime deprivation of her spouse's relationship. Thereafter, if the marriage ends in divorce, as nearly half of all marriages do,<sup>134</sup> the recovering spouse may remarry, bear children, and actually lose little with respect to the damages assessed in the spousal consortium action. It has been noted that:

Sometimes a [spousal] consortium plaintiff is not damaged, even though the spouse was severely injured. Large numbers of people spend good money each year to put away the companionship of their marital partner. Unless the consortium plaintiff testifies the jury must speculate as to . . . whether she was in fact more unburdened than damaged by the incident.<sup>135</sup>

Furthermore, the second marriage and subsequent children are benefits the party would not have been able to obtain but for the dissolution of the previous relationship. As a result, the uninjured but compensated spouse has gained a "windfall," having already been

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131. *E.g., Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135, 1137 (Ind. 1990) ("[T]he spousal action rests in large part on the deprivation of sexual relations and the accompanying loss of childbearing opportunity.") (quoting *Salin v. Kloempken*, 322 N.W.2d 736, 739 (Minn. 1982)); *Nicholson v. Hugh Chatham Memorial Hosp., Inc.*, 266 S.E.2d 818, 821 (N.C. 1980) ("[T]he 'uninjured' spouse's loss of conjugal fellowship deprives that spouse of sexual gratification and the possibility of children.").

132. *Peeples v. Sargent*, 253 N.W.2d 459, 471 (Wis. 1977) ("Consortium involves a broad range of elements . . . any one of which is sufficient to constitute a cause of action.") (quoting *Schwartz v. Milwaukee*, 195 N.W.2d 480, 484 (Wis. 1972)).

133. *Borer v. American Airlines, Inc.*, 563 P.2d 858, 868 (Cal. 1977) (Mosk, J. dissenting).

134. See *Hamburg*, *supra* note 33; *Baby-Boom Women*, *supra* note 34.

135. *Middlebrook v. Imler, Tenny & Kugler, M.D.'s, Inc.*, 713 P.2d 572, 588-89 (Okla. 1985) (Summers, J., dissenting in part and concurring in part) (footnotes omitted).

compensated for the lifelong loss of a marital relationship and inability to bear and raise children.

Courts have further distinguished the spousal consortium claim from that of the child on the basis that the injury to the marital relationship is foreseeable, and therefore compensable.<sup>136</sup> However, courts choosing to recognize the child's action have indicated that the foreseeability of harm to a victim's child is as foreseeable as harm to a victim's spouse.<sup>137</sup> That a child whose parent has been seriously injured will suffer severe emotional damage herself is likewise foreseeable.<sup>138</sup> In fact, due to the dependent nature of the parent-child relationship, it is more foreseeable that a child would be severely affected by a parent's injury than an adult, and independent, spouse.

Finally, courts recognizing the spousal action have often denied the child's consortium claim in an effort to limit tortfeasor liability.<sup>139</sup> Courts have feared that extending the spousal action to children may lead to claims from grandparents, close friends or other relatives.<sup>140</sup> This argument has been rejected as ignoring the importance of the parent-child relationship.<sup>141</sup> One writer has asserted that:

The distinction between the interests of children and those of other relatives is rational and easily applied. Most children are dependent on their parents for emotional sustenance. This is rarely the case with more remote relatives. Thus, by limiting the plaintiffs in the consortium action to the victim's children, the courts would ensure that the losses compensated would be both real and severe.<sup>142</sup>

Therefore, denial of the child's consortium action on these grounds is misguided and inappropriate.

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136. See cases cited *supra* note 12.

137. E.g., *Villareal v. State Dep't of Transp.*, 774 P.2d 213, 218 (Ariz. 1989) ("We believe that the foreseeability of harm to a victim's child is as equally foreseeable as harm to a victim's spouse."); *accord Hay v. Medical Ctr. Hosp.*, 496 A.2d 939, 943 (Vt. 1985).

138. *Villareal*, 774 P.2d at 218; *Belcher v. Goins*, 400 S.E.2d 830, 840 (W. Va. 1990) ("Because of the crucial role of the parent . . . damages are almost certain to be inflicted when a tortfeasor interferes with these relationships by seriously injuring the parent physically."); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1174 (Wyo. 1990).

139. *Lewis v. Rowland*, 701 S.W.2d 122, 124 (Ark. 1985); *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977); *Lee v. Colorado Dep't of Health, Inc.*, 718 P.2d 221, 234 (Ohio 1986); *Dearborn Fabricating & Eng'g Corp. v. Wickham*, 551 N.E.2d 1135, 1137 (Ind. 1990) (quoting *Borer*, 562 P.2d at 863); *Durepo v. Fishman*, 533 A.2d 264, 265 (Me. 1987); *Gaver v. Harrant*, 557 A.2d 210, 217 (Md. 1989); *Salin v. Kloempken*, 322 N.W.2d 736, 739 (Minn. 1982) (quoting *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980)); *Russell v. Salem Transp. Inc.*, 295 A.2d 862, 864 (N.J. 1972); *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 333 (Or. 1982).

140. *Villareal*, 774 P.2d at 219; *Borer*, 563 P.2d at 862; *Belcher v. Goins*, 400 S.E.2d 830, 840 (W. Va. 1990); *Theama v. City of Kenosha*, 344 N.W.2d 513, 521 (Wis. 1984).

141. *Theama*, 344 N.W.2d at 521 ("[W]e believe that this argument ignores the importance of the nuclear family in present-day society."); *Belcher*, 400 S.E.2d at 840.

142. See *Dwork*, *supra* note 104, at 738 (encouraging recognition of the child's action notwithstanding the "exorbitant liability" argument).

Courts have also expressed concerns that expanding the action to compensate children will lead to increased insurance premiums.<sup>143</sup> However, "the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance."<sup>144</sup> Additionally, courts recognizing the child's action have concluded that the benefit to the child whose relationship with his parent has been damaged outweighs any additional costs to society.<sup>145</sup>

## CONCLUSION

The common law consortium action developed as a reflection of changing views and societal attitudes. Initially an action available only to the husband, the wife's claim is now widely recognized. Several states have allowed the child's claim as well. However, the majority of state supreme courts still deny a consortium action to a child whose relationship with a parent has been damaged as the result of an injury to the parent.

Recent changes in family structure, marriage trends and expectations and current social and judicial emphasis on children's rights dictate that the child's action for loss of parental consortium be recognized, and the corresponding spousal action be abolished.

Today's society reflects high divorce rates, greater postponement of and abstention from marriage and rising numbers of single-parent families.<sup>146</sup> These factors indicate increasing disillusionment with marriage and lower expectations of the marital relationship. At the same time, growing recognition of and concern for children's rights are reflected in Wrongful Death Statutes—which allow children to recover for injuries resulting in death to their parents, judicial consideration of the child's best interests in child custody matters, court decisions that deny one parent the right to contract away a child's right to support from the other parent, and Supreme Court recognition of the child as an individual under the Constitution.<sup>147</sup>

Further, an examination of the arguments presented by courts to justify recognition of the spousal consortium action and to deny the child's corresponding claim for loss of parental consortium reveals that the judicial reasoning in this area is artificial, insignificant and strained.<sup>148</sup> With the exception of the sexual element of the marital relationship, every basis upon which the child's action has been denied has likewise been asserted to defeat the spousal claim, and has been firmly rejected.<sup>149</sup>

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143. *Berger v. Weber*, 303 N.W.2d 424, 426 (Mich. 1981); *Norwest*, 652 P.2d at 322; *Hay v. Medical Ctr. Hosp.*, 496 A.2d 939, 946 (Vt. 1985); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 195 (Wash. 1984); *Belcher*, 400 S.E.2d at 839; *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1176 (Wyo. 1990).

144. *Norwest*, 652 P.2d at 323; *accord Belcher*, 400 S.E.2d at 839; *Nulle*, 797 P.2d at 1176 ("Insurance is a loss-spreading device by design. Increases in premiums are unwarranted only when it is decided that the innocent victim will bear the loss rather than the guilty tortfeasor, his insurer, and the public.").

145. *E.g., Berger*, 303 N.W.2d at 462; *Hay*, 496 A.2d at 946; *Theama*, 344 N.W.2d at 521.

146. *See supra* Part II.

147. *See supra* subpart II.D.

148. *See supra* Part IV.

149. *See supra* Part IV.

Recognition of the child's action for loss of parental consortium, and denial of the spousal action, would serve several positive and necessary purposes by: 1) reflecting current attitudes toward marriage and lower expectations of the marital relationship; 2) protecting the greater interests of society in ensuring the proper development of a child whose relationship with a parent has been damaged or destroyed by a third party; 3) guarding against the great possibility of excessive recovery to the spouse who is awarded consortium damages and later divorces the injured spouse and remarries; and 4) eliminating courts' reluctance to recognize the child's action on the grounds that doing so would extend liability beyond its current scope. Most importantly, to permit the child to recover for injury to the parent-child relationship would acknowledge its standing as "the earliest and most hallowed of the ties that bind humanity."<sup>150</sup>

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150. *Voss v. Ralston*, 550 P.2d 481, 485 (Wyo. 1976).













